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v.
South Carolina Tax Commission, et al.

Docketed:
August 13, 1984

Court: Supreme Court of South Carolina
Counsel for petitioner: Parr Jr., Henry L.
Counsel for respondent: Stevens, Ray N.

Entry	Date	Note	Proceedings and Orders
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2	Sep 15 1984		Brief of respondents SC Tax Commn., et al. in opposition filed.
3	Sep 19 1984		DISTRIBUTED. October 5, 1984
4	Sep 28 1984	X	Reply brief of petitioners Roger L. Spencer, et ux. filed.
5	Oct 9 1984		Petition GRANTED. *****
6	Oct 30 1984		Joint appendix filed.
7	Nov 30 1984		Brief of petitioners Roger L. Spencer, et ux. filed.
8	Dec 10 1984		Record filed.
9	Dec 28 1984		Brief amicus curiae of Council of State Governments, et al. filed.
10	Jan 2 1985		Brief amicus curiae of Alaska, et al. filed.
11	Jan 4 1985		SET FOR ARGUMENT. Wednesday, February 27, 1985. (3rd case.)
12	Jan 14 1985		Brief of respondent SC Tax Commn. filed.
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ALEXANDER L. STEVAS

CLERK

In the Supreme Court of the United States

October Term, 1984

**ROGER L. SPENCER AND SHIRLEY L. SPENCER,
PETITIONERS**

v.

**SOUTH CAROLINA TAX COMMISSION, CHARLES N.
PLOWDEN, IN HIS CAPACITY AS A MEMBER AND
AS THE CHAIRMAN OF THE SOUTH CAROLINA TAX
COMMISSION, ROBERT C. WASSON, IN HIS
CAPACITY AS A MEMBER OF THE SOUTH
CAROLINA TAX COMMISSION AND JOHN T.
WEEKS, IN HIS CAPACITY AS A MEMBER OF THE
SOUTH CAROLINA TAX COMMISSION
RESPONDENTS**

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA**

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QUESTIONS PRESENTED

1. May a state court of general jurisdiction refuse to entertain a plaintiff's 42 U.S.C. § 1983 claim and thereby avoid awarding attorney's fees under 42 U.S.C. § 1988 even though the plaintiff successfully challenges in that court a state statute's validity under the United States Constitution?

2. May a state court deny attorney's fees under 42 U.S.C. §§ 1983 and 1988 on the ground that Congress did not intend §§ 1983 and 1988 to require an award of attorney's fees where a state law provides a state remedy and prohibits the award of attorney's fees?

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OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (App. A at 1a-11a.) has not yet been reported in the official reports but is reported at 316 S.E.2d 386. The opinion of the trial court (App. B at 12a-21a.) is not reported.

JURISDICTION

The opinion of the Supreme Court of South Carolina was filed on May 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution,
Article VI, clause 2, (App.
E at 25a.)

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at 25a.)

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Civil Rights Attorney's Fees
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S.C. Code Ann. § 12-47-220
(App. E at 26a.)

S.C. Code Ann. § 12-47-270
(App. E at 27a.)

STATEMENT

The South Carolina Supreme Court has refused to enforce the petitioners' rights under 42 U.S.C. §§ 1983 and 1988.

The petitioners, the Spencers, have resided in North Carolina since 1977 but, in 1980, derived all their income from Mr. Spencer's job in South Carolina. When the Spencers filed for a refund of approximately \$500 of South Carolina income taxes withheld for 1980, the South Carolina State Tax Commission denied their request and claimed about \$100 more in taxes. The Commission's action was based on a recently enacted South Carolina statute which denied the

Spencers the right to deduct any non-business expenses against their South Carolina income because North Carolina did not permit non-residents to take similar non-business deductions against income earned in North Carolina.

The Spencers then brought a lawsuit in South Carolina state court challenging the constitutionality of the new tax statute on which the Commission had relied. They sought the money they had been forced to pay under that statute as well as their attorney's fees. They alleged, among other things, that the new tax statute violated the privileges and immunities clause, Article IV, § 2, clause 1, as well as other parts of the United States Constitution.

They brought their lawsuit in state court pursuant to the procedures specified in S.C. Code Ann. § 12-47-220 as

well as pursuant to 42 U.S.C. § 1983 and prayed for their attorney's fees under 42 U.S.C. § 1988. (App. B at 18a.) The Spencers took advantage of the availability of attorney's fees under § 1988 in order to undertake the litigation even though only about \$600 was at stake. State court was the only forum reasonably available because their chances of successfully bringing the action in federal court were slim after Fair Assessment In Real Estate Association v. McNary, 454 U.S. 100, 102 S.Ct. 177 (1981).

The Spencers prevailed in their attack on the new tax statute. The state trial court declared that the tax statute violated the United States Constitution and ordered the Commission to pay the Spencers approximately \$600. The court, however, refused to entertain the Spencers' § 1983 claim and refused to

award attorney's fees under § 1988. It recognized

that the plaintiff's [had] ... incurred attorney's fees and other expenses which probably [made] the refund ... a "tasteless" victory.

(App. B at 18a.) But it insisted, in spite of §§ 1983 and 1988, that it lacked authority to award fees because S.C. Code Ann. § 12-47-220 provided the Spencers a remedy and S.C. Code Ann. § 12-47-270 did not allow costs to be taxed to either party.

The Commission appealed the portion of the order striking down the new tax statute. The Spencers appealed from the trial court's refusal to entertain the § 1983 claim and denial of attorney's fees. On appeal, the Commission argued that the denial of attorney's fees should be affirmed for several reasons. One reason was that the trial court had no

obligation to consider the § 1983 claim because there was an adequate remedy at state law under § 12-47-220. (App. C at 22a.) In response, the Spencers contended that the federal Constitution required the trial court to consider their § 1983 claim and award them attorney's fees. (App. D at 24a.) They contended further that any state statute that purported to deny them the attorney's fees guaranteed by §§ 1983 and 1988 was invalid because that statute had to yield to §§ 1983 and 1988 under the supremacy clause of the United States Constitution. (App. D at 23a.)

The South Carolina Supreme Court affirmed the trial court in all respects. It held that the new statute was unconstitutional under the privileges and immunities clause of the United States Constitution. But it left the Spencers

with a "tasteless victory" because it recognized and affirmed the trial court's decision not to address the § 1983 claim and award attorney's fees under § 1988. (App. A at 10a-11a.)

In support of its decision to reject the Spencers' § 1983 and § 1988 claims, the state supreme court noted that this Court has not ruled that state courts must entertain § 1983 actions. (App. A at 10a.) In spite of the Spencers' contention that they had obtained only a "hollow victory," the South Carolina court concluded that §§ 1983 and 1988 may not be invoked to supplement available state remedies with attorney's fees. The court noted that S.C. Code Ann. § 12-47-270 prohibited the taxation of costs in actions pursuant to § 12-47-220 and declared that "state remedies for asserting rights may not be circumvented by invok-

ing § 1983." (App. A at 10a.) Apparently in response to the Spencers' argument that any state statute attempting to limit the remedies available under §§ 1983 and 1988 was invalid, the court asserted that Congress had not intended that §§ 1983 and 1988 be used solely "to justify the allowance of counsel fees." (App. A at 10a.)

After bearing the expense of successfully challenging the constitutionality of the statute under which they had been taxed, the Spencers were left with a recovery of only approximately \$600.

REASONS FOR GRANTING THE PETITION

1. This Court has not yet considered whether a state court may refuse to entertain a substantial § 1983 action. It is clear that state courts may entertain § 1983 actions. Maine v. Thiboutot, 448 U.S. 1, 3 n.1, 100 S. Ct. 2502, 2503

n.1 (1980). But this Court has specifically left open the question of whether a state court is obligated to enforce § 1983. Id. In Martinez v. California, 444 U.S. 277, 283 n.7, 100 S. Ct. 553, 558 n.7 (1980), this Court noted the conflict between the Tennessee Supreme Court's refusal to permit state courts to entertain § 1983 actions, Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969), and the rule of Testa v. Katt, 330 U.S. 386, 393-94, 67 S. Ct. 810, 814-15 (1947), that "state courts are generally not free to refuse enforcement of [a] federal claim." But this Court left the conflict unresolved. It said
 [w]e have never considered, however, the question whether a State must entertain a claim under § 1983.

Martinez v. California, 444 U.S. at 283 n.7, 100 S. Ct. at 558 n.7. That question remains unresolved. The Court

should now grant certiorari to resolve the question. It is presented squarely in this case. The confusion regarding it has increased, and important national policies are threatened by that confusion.

2. State courts conflict as to whether they are obliged to entertain § 1983 actions. By its decision in the case under review, the South Carolina Supreme Court has joined other state courts which have refused to entertain § 1983 actions. The decisions of these courts conflict with those of the courts of other states which have recognized their obligation under the United States Constitution to enforce § 1983 as well as § 1988. The South Carolina decision also conflicts with decisions of the great majority of state courts which have accepted § 1983 claims without considering whether they

were obligated to do so.

Among the courts refusing to entertain § 1983 claims, Tennessee and South Carolina have rejected § 1983 the most broadly. The Supreme Court of Tennessee has forbidden Tennessee courts from entertaining any § 1983 action. It has declared that

it would be illogical indeed to hold that a State court should enforce, or is required to enforce [§ 1983].

Chamberlain v. Brown, 442 S.W.2d at 252.

In the instant case, the South Carolina Supreme Court rejected § 1983 claims nearly as completely as did the Tennessee court. The South Carolina court concluded that South Carolina courts should not entertain a § 1983 action when § 1983 supplements available state remedies.¹ Its decision focused

¹The court declared that "[s]tate remedies for asserting rights may not be circumvented by invoking § 1983." (App. A at 10a.)

particularly on the attorney's fees provided by § 1988 and not available under state law. It then declared that

it may reasonably be inferred that the sole reason for alleging § 1983 was to justify the allowance of counsel fees. We do not believe this was contemplated by Congress when it enacted §§ 1983 and 1988.

(App. A at 10a.)²

Because South Carolina state courts may not now entertain § 1983 actions when § 1983 supplements available state remedies, South Carolina courts are now closed to most § 1983 claims. The South Carolina court's ruling has this effect because attorney's fees are available in

²The South Carolina Supreme Court cited Brown v. Hornbeck, 54 Md. App., 458 A.2d 900 (1983) for this proposition; why it did so is uncertain. Attorney's fees were denied in Brown v. Hornbeck, because the plaintiffs did not have a substantial federal claim. Maryland state courts do entertain substantial § 1983 actions. DeBleecker v. Montgomery County, 48 Md. App. 455, 427 A.2d 1075 (1981), rev'd on other grounds, 292 Md. 498, 438 A.2d 1348 (1982). The Spencers not only had a substantial federal claim, but they prevailed on it.

any § 1983 action, Maine v. Thiboutot, 448 U.S. at 9, 100 S. Ct. at 2507, but attorney's fees are not normally available in actions in South Carolina state courts.³

The extent to which other state courts have rejected jurisdiction over §1983 claims is less clear. In City of North Miami v. Schy, 408 So. 2d 670 (Fla. Dist. Ct. App. 1981) the Florida court affirmed a lower court's refusal to accept a § 1983 action. It provided no explanation for its position except a reference to the portions of Thiboutot and Martinez which note that this Court

³"As a general rule, attorney's fees are not recoverable unless authorized by contract or statute." Hegler v. Gulf Insurance Co., 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978). The South Carolina legislature has, by statute, authorized trial courts to award attorney's fees only in a few specific contexts. See e.g., the South Carolina Uniform Securities Act, S.C. Code Ann. § 35-1-1490, and the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140.

has not considered whether a state court must enforce § 1983.

The Georgia Supreme Court has also rejected § 1983 actions but only in one specifically defined context.⁴ In Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976), the Georgia court refused to permit state procedures for equalizing taxes to be circumvented by a § 1983 suit. The court held that a § 1983 action is not available in Georgia state courts when "founded only on the claim that the assessments are unequal." Id. 224 S.E.2d at 374.

⁴The Georgia court also rejected a putative § 1983 claim in Deriso v. Cooper, 246 Ga. 540, 272 S.E.2d 274, 277 (1980). But the § 1983 claim apparently had no substance. The court held only that state remedies could not be circumvented merely by a mention of § 1983 in the absence of a substantial § 1983 claim. The rights on which the case was based appear to have arisen solely from state law, with the possible exception of a racial discrimination claim which the court ruled belonged before a federal court already considering a similar claim.

The Mississippi Supreme Court has limited plaintiffs' ability to bring certain § 1983 cases by imposing an exhaustion requirement. But it has not refused altogether to entertain those cases. It has concluded that "state courts have jurisdiction of 1983 actions concurrent with federal courts....[but] the exhaustion of state remedies rule is applicable in actions brought under section 1983 to enjoin, suspend or restrain the assessment, levy or collection of taxes because of [28 U.S.C. 1341, the Tax Injunction Act]." State Tax Commission v. Fondren, 387 So. 2d 712, 723 (Miss. 1980), cert. denied, 450 U.S. 1040 (1981)⁵.

⁵In reaching its decision, the Mississippi court did not have the benefit of the discussion of exhaustion requirements in Patsy v. Board of Regents, 457 U.S. 496, 102 S. Ct. 2557 (1982).

Unlike the Georgia and Mississippi decisions, the South Carolina court's decision is not confined to state tax cases. Although the case involved a successful constitutional attack on a tax statute, the court did not refuse the § 1983 claim because of problems unique to taxation. The court rejected § 1983 because it supplemented state remedies by providing attorney's fees under § 1988. As discussed above, § 1983 supplements available state remedies in the same way in most cases. Although it cited Backus, the Georgia decision involving tax assessments discussed above, the South Carolina Supreme Court made no attempt to limit its discussion to tax cases. The South Carolina court ruled broadly. Its decision closes South Carolina courts to most § 1983 actions. (See 11-13 supra.)

In contrast to the South Carolina Supreme Court, the courts of at least five other states have declared that their state courts must accept jurisdiction over § 1983 claims. Of those courts, the Supreme Court of Wisconsin in Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977), has provided the most thorough analysis of the question. After considering Article VI, clause 2 of the United States Constitution, the legislative history of § 1983, and numerous opinions of this Court, including Testa v. Katt, 330 U.S. 386, 67 S. Ct. 810 (1947), the court concluded that Wisconsin state courts

have jurisdiction to hear and decide Sec. 1983 cases. In addition, they have an affirmative obligation under the Constitution of the United States to take jurisdiction whether or not the federal right asserted is pendent to a state claim.

Terry v. Kolski, 254 N.W.2d at 712.

Courts of Alabama, New York, Indiana, and California have also acknowledged the obligation to entertain § 1983 claims, although the rationale of these state court decisions have not been as clearly expressed.⁶

The approach of the South Carolina Supreme Court also conflicts with that of the vast majority of state courts which

⁶See Terrell v. City of Bessemer, 406 So. 2d 337, 340 (Ala. 1981) ("courts of this state must accept jurisdiction over claims brought under 42 U.S.C. § 1983 if a § 1983 plaintiff selects a state court as his forum."); Felder v. Foster, 107 Misc. 2d 782, 436 N.Y.S.2d 675, 677 (N.Y. Sup. Ct. 1981) ("This court has jurisdiction to entertain all proceedings brought under sections 1983 and 1988... and must exercise that jurisdiction when such a proceeding is properly before it (Testa v. Katt....)"); Colvin v. Bowen, 399 N.E.2d 835, 837 (Ind. Ct. App. 3rd Dist. 1980) ("[S]tate courts of general jurisdiction are not free to deny enforcement of claims growing out of a valid federal statute such as § 1983."); Brown v. Pitchess, 119 Cal. Rptr. 204, 531 P.2d 772, 775 (Cal. 1975) (en banc) ("the existence of [concurrent] jurisdiction creates the duty to exercise it....it is unlikely that this decision will precipitate a 'flood of litigation in California courts.'")

have freely recognized concurrent jurisdiction over § 1983 claims.⁷ Many of these courts have also expressly recognized the obligation to award attorney's fees under § 1988.⁸

One of these courts, the Massachusetts Supreme Judicial Court, has

⁷These cases are collected in Appendix F at 28a.

⁸See, e.g.: Stratos v. Department of Public Welfare, 387 Mass. 312, 439 N.E.2d 778, 783-85 (1982); Johnson v. Blum, 58 N.Y.2d 454, 448 N.E.2d 449, 450-451 (1983) (Fee must be awarded absent "special circumstances"); Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 340 N.W.2d 704, 711, 714 (1983) (award of damages and attorney's fees affirmed even though it exceeded state law limitation on municipal liability); Ward Lumber Co. v. Brooks, 50 N.C. App. 294, 273 S.E.2d 331, 333 (1981). ("it is not necessary that the court base its decision on § 1983 in order for the prevailing party to be entitled to attorney's fees under.... § 1988"); Davis v. Everett, 443 So.2d 1232, 1235, (Ala. 1983); Caputo v. City of Chicago, 113 Ill. App. 3d 45, 446 N.E.2d 1240, 1242 (1983) (denied fees but recognized that proper § 1983 claims may be brought in state court and "fees authorized under 42 U.S.C. § 1988 are an appropriate part of the remedy in such cases.")

squarely rejected the rationale adopted by the Supreme Court of South Carolina. In Stratos v. Department of Public Welfare, 387 Mass. 312, 439 N.E.2d 778 (1982), the defendant contended that the § 1983 claim should be disregarded as "superfluous" because the remedy sought was available under state law. The defendant contended further that the § 1983 claim was "an unnecessary afterthought, appended to the case as a 'hook' on which to hang an award of attorney's fees." The Supreme Judicial Court recognized the fallacy of the defendant's argument and dismissed it saying:

Section 1983 provides an independent remedy for violation of rights protected by Federal law. If such a right is at issue, the § 1983 remedy is available, even if the State has also provided a means of obtaining relief....The fee incentive is equally useful and necessary whether the right in question is secured by Federal law alone or by State law as well. Therefore, the fact that a

plaintiff claiming relief under § 1983 could have obtained relief solely by means of a state remedy - even a 'routine' one - does not foreclose a fee award.

439 N.E.2d at 783.

3. The South Carolina Court has undermined the congressional policy embodied in §§ 1983 and 1988. By refusing to permit §§ 1983 and 1988 to be used as a way of supplementing state remedies with attorney's fees, the South Carolina Supreme Court has refused to implement the command of Congress. This Court noted long ago in Monroe v. Pape, 365 U.S. 167, 183, 81 S. Ct. 473, 482 (1961), overruled on other grounds 436 U.S. 658, 98 S. Ct. 2018 (1978), that § 1983 has provided a remedy that "is supplementary to the state remedy." Section 1983 cannot be avoided simply because "the State has a law which if enforced would give relief." Id. The state remedy "need not

be first sought and refused before...

[§ 1983] is invoked." Id.

Both §§ 1983 and 1988 were enacted "to benefit those claiming deprivations of constitutional and civil rights." Maine v. Thiboutot, 448 U.S. at 9, 100 S. Ct. at 2507. Awards of attorney's fees under § 1988 are "'an integral part of the remedies necessary to obtain' compliance with § 1983." Id. 448 U.S. at 11, 100 S. Ct. at 2508 quoting S. Rep. No. 94-1011, p. 5 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5913. By refusing to entertain the Spencers' § 1983 claim and award attorney's fees, the South Carolina court has denied them an essential remedy to which they have a right under §§ 1983 and 1988.

Congress enacted § 1988 because it was concerned that the prospect of a hol-

low victory would prevent the vindication of constitutional rights. The Senate report on the attorney's fees portion of § 1988 noted that

[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, p. 2 (1976),
reprinted in 1976 U.S. Code Cong. & Ad.
News 5908, 5910. The Senate Report
concluded that

[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rep. No. 94-1011 at 7, reprinted in
1976 U.S. Code Cong. & Ad. News at 5908,
5913.

The South Carolina Supreme Court's decision renders § 1983 no more than a "hollow pronouncement" for the Spencers and other plaintiffs with similar claims. The South Carolina court itself acknowledged in its opinion that the Spencers might have obtained only a "hollow victory." (App. A at 9a.) As long as the state courts are permitted to refuse to supplement state remedies with the attorney's fees provided by §§ 1983 and 1988, it will be difficult for many private citizens to enforce their constitutional rights. The problem is serious and requires this Court's consideration.

4. The South Carolina Supreme Court's decision is inconsistent with several decisions of this Court. This Court has repeatedly reversed attempts by state courts to refuse to consider claims aris-

ing under federal law. In Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1, 32 S. Ct. 169 (1912), this Court held that a state court had a duty to hear the federal claims properly brought before it, even if the federal statutes on which those claims were based conflicted with the state's own policy. This Court stated that a state court "is just as much bound to recognize [the laws of the United States] as operative within the State as it is to recognize the state laws" and "[t]he existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." Ibid., 223 U.S. at 58. This Court concluded "that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdic-

tion, as prescribed by local laws, is adequate to the occasion." [emphasis supplied] Ibid., 223 U.S. at 59.

The unmistakable message of the Mondou case has been reaffirmed several times by this Court. In McKnett v. St. Louis & S.F.R.Y. Co., 292 U.S. 230, 54 S. Ct. 690 (1934), this Court again rejected a state court's refusal to hear a federal claim:

[T]he Federal Constitution prohibits state courts of general jurisdiction from refusing to [hear a case] solely because the suit is brought under a federal law.... A state may not discriminate against rights arising under federal laws.

54 S. Ct. at 692.

Of similar effect is the case of Testa v. Katt, 330 U.S. 386, 67 S. Ct. 810 (1947). There, this Court noted that the states' obligation to enforce federal laws "is not lessened by reason of the form in which they are cast or the remedy

which they provide." 330 U.S. at 391. The court declared that when a state court has jurisdiction "adequate and appropriate under established local law," 330 U.S. at 394, its refusal to enforce a plaintiff's federal claim "flies in the face of the fact that the States of the Union constitute a nation" and disregards the purpose and effect of the Supremacy Clause of the Constitution. Ibid. 330 U.S. at 389.

This line of cases makes clear that the South Carolina state court's refusal here to entertain the Spencers' § 1983 claim was erroneous. There can be no question that the South Carolina trial courts have jurisdiction "adequate to the occasion" of deciding a § 1983 claim. Article V, Section 7 of the South Carolina Constitution provides that "[t]he Circuit Court shall be a general

trial court with original jurisdiction in civil and criminal cases...." Furthermore, the claims made and remedies sought in the Spencers' lawsuit are the sorts of claims and remedies with which the South Carolina trial courts are amply familiar. South Carolina trial courts grant monetary judgments on a daily basis. S.C. Code Ann. § 15-53-20 expressly authorizes the state trial courts to grant declaratory relief in appropriate cases. In some contexts, state statutes permit the trial courts to award reasonable attorney's fees. See p. 13, footnote 3 supra. In short, like the state courts in the Mondou, McKnett and Testa cases, the state court here had no legitimate reasons for refusing to entertain the federal cause of action. The South Carolina Supreme Court's decision in this case, therefore, directly contradicts this

Court's decisions in the Mondou, McKnett and Testa cases.

5. By denying attorney's fees, the South Carolina court's opinion leaves many victims of unconstitutional state taxation and other violations of federal rights without any practical remedy. The ability to collect attorney's fees is vital to the enforcement of constitutional rights when small amounts of money are at stake. In this case, the Spencers lost \$585 as a result of the enforcement of a state statute which they have successfully attacked. Many other taxpayers may have lost similar amounts. But, as the trial judge remarked, the Spencers' victory is "tasteless" to them because of the expenses and attorney's fees involved in maintaining an action such as this. (App. B at 18a.)

The Spencers reside and vote in

North Carolina although they must pay taxes in South Carolina. A § 1983 suit in state court coupled with a request for attorney's fees under § 1988 is the only practical way for taxpayers like the Spencers to attack an unconstitutional South Carolina tax statute. For such a case, the federal courts are not available. The principles of comity and 28 U.S.C. § 1341 have effectively closed the federal courts to actions like this one, even when brought under § 1983. See Fair Assessment In Real Estate Association v. McNary, 454 U.S. 100, 102 S. Ct. 177 (1981).⁹

⁹McNary did not actually decide whether a § 1983 action attacking a state tax law but not requiring scrutiny of tax assessment practices may be brought in federal court. See McNary 454 U.S. at 107 n.4, 102 S. Ct. at 181 n.4. Nevertheless, the risk of being unable to bring such an action in federal court after McNary is great enough to discourage plaintiffs with small claims from incurring the cost of attempting to proceed in federal court.

In the absence of §§ 1983 and 1988, state procedures would also effectively bar claims like the Spencers'. Taxpayer class actions are generally not permitted in South Carolina state courts.¹⁰ Costs and attorney's fees are not available under state law to those who successfully challenge a South Carolina tax statute. See S.C. Code Ann. § 12-47-270 and p. 13 footnote 3 supra.

A § 1983 suit in state court is also the only available practical remedy for those who have been deprived of federal rights in other contexts but, due to individual financial or logistical problems, are barred from federal court. Constitutional litigation against a state is often costly. If one cannot bring a § 1983 suit in state court and obtain

¹⁰See Long v. Seabrook, 260 S.C. 562, 567-68, 197 S.E.2d 659, 661-62 (1973).

attorney's fees under § 1988, the cost of litigating modest claims, like the Spencers', will often cause the claim not to be litigated at all.

If the South Carolina Supreme Court's decision stands, the state will be free to extract small amounts from many people unconstitutionally. Those who act under the color of state law will also be made more free to deny federal rights in countless ways. The victims, especially if they are politically powerless non-residents like the Spencers, will not be able to protect themselves.

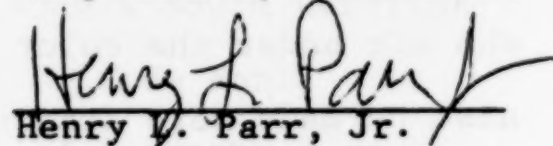
CONCLUSION

Review of the opinion below is necessary to end the confusion regarding the important issues presented and to ensure that state courts do not undermine the important congressional policy

embodied in 42 U.S.C. §§ 1983 and 1988.
 Petitioners respectfully request the
 issuance of a writ of certiorari to the
 Supreme Court of South Carolina to
 consider the questions presented together
 with all subsidiary questions fairly
 included therein.

Respectfully submitted,

August 13, 1984


 Henry V. Parr, Jr.


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APPENDIX A

THE STATE OF SOUTH CAROLINA In The Supreme Court

Roger L. Spencer and Shirley L. Spencer,
Respondents-Appellants,

v.

South Carolina Tax Commission, Charles N.
 Plowden, in his capacity as a member and
 as the Chairman of the South Carolina Tax
 Commission, Robert C. Wasson, in his
 capacity as a member of the South
 Carolina Tax Commission and John T.
 Weeks, in his capacity as a member of the
 South Carolina Tax Commission,
Appellants-Respondents

Appeal From Greenville County
 Wylie H. Caldwell, Jr., Special Judge

OPINION NO. 22105

Heard April 3, 1984 - Filed May 15, 1984

AFFIRMED

HARWELL, A. J.: The taxpayers, Mr. and
 Mrs. Roger L. Spencer, paid their 1980
 South Carolina income taxes under protest
 and initiated this action for a refund.
 The trial judge granted the refund but

denied attorneys' fees. We affirm.

The Spencers are North Carolina residents, but Mr. Spencer, the sole wage-earner, is employed in Greenville, South Carolina. The Spencers filed a joint return and claimed nonbusiness deductions for federal, state, and local taxes; interest; and charitable contributions. The Tax Commission disallowed the deductions pursuant to the proviso to S. C. Code Ann. §12-7-750 (1983).

This appeal involves the construction and constitutionality of §12-7-750. The statute provides:

In the case of a nonresident individual the deductions allowed in §12-7-700, 12-7-710 and 12-7-740 shall be allowed only if, and to the extent that, they are connected with income arising from sources within the State and the proper apportionment and allocation of the deductions with respect to sources of income within and without this State shall be determined under rules and regulations prescribed by the Commission.

Provided, however, that a nonresident individual shall not be permitted to apportion and allocate his nonbusiness deductions between this State and his state of principal residence unless his state of principal residence also permits similar apportionment and allocation of nonbusiness deductions by nonresident individuals filing returns in that state. The South Carolina Tax Commission shall promulgate necessary regulations to effectuate the provisions of this proviso.

The trial court held that the proviso to §12-7-750 violated the Privileges and Immunities Clause of the United States Constitution, Article IV, §2, Cl. 1.

The Tax Commission contends on appeal to this Court that the statute can be given a constitutional construction. It asserts that, under the first paragraph, nonresidents filing in South Carolina are allowed to claim only business deductions and that this limitation does not violate the Privileges and Immunities Clause. In support of this position, the Commission

cites Stiles v. Currie. 254 N. C. 197, 118 S. E. 2d 428 (1961); Berry v. State Tax Comm'n, 241 Or. 580, 397 P. 2d 780 (1964), appeal dismissed, 382 U. S. 16 (1965); and Goodwin v. State Tax Comm'n, 286 App. Div. 694, 146 N. Y. S. 2d 172 (1955), aff'd mem. 133 N. E. 2d 711, appeal dismissed 352 U. S. 805 (1956).

The Commission asserts that the proviso therefore aids rather than penalizes nonresidents since it allows nonresidents to claim nonbusiness deductions under circumstances of reciprocity.

We reject this construction. The Commission's regulations prior to this lawsuit construed Paragraph 1 of §12-7-750 to allow nonresident taxpayers both business and nonbusiness deductions prorated in the ratio of their South Carolina Adjusted Gross Income to their total Adjusted Gross Income. After the pro-

viso's enactment, prior to this lawsuit, the Commission began to disallow nonbusiness deductions in situations where the state of the taxpayer's residence lacked reciprocal legislation.

The Commission's attempt to change its interpretation of the statute is not persuasive. Where the administrative construction of a statute has been uniform and has been acquiesced in by the General Assembly, such construction is entitled to weight. Etiwan Fertilizer Co. v. S. C. Tax Comm'n, 217 S. C. 354, 60 S. E. 2d 682 (1950). We agree with the Commission's initial construction of the statute.

We must now determine whether the proviso violates the Privileges and Immunities Clause.

Application of the Privileges and Immunities Clause to an instance of dis-

crimination against out-of-state residents entails a two-step inquiry.¹ United Building and Constr. Trades Council v. City of Camden, 52 U. S. L. W. 4187 (February 21, 1984). The Court must first decide whether the statute burdens one of the privileges and immunities protected by the Clause. One of the most fundamental privileges which the Clause guarantees to citizens of a state is that of doing business in another state on terms of substantial equality with the citizens of that state. Id., See also Hicklin v. Orbeck, 437 U. S. 518 (1978); Austin v. New Hampshire, 420 U. S. 656 (1975); Mullaney v. Anderson, 342 U. S.

¹The terms "citizen" and "resident" are "essentially interchangeable" for purposes of analyzing cases under the Privileges and Immunities Clause. Austin v. New Hampshire, 420 U. S. 656, 662, n.8 (1975).

415 (1952); Toomer v. Witsell, 334 U. S. 385 (1948). The discrimination against nonresident taxpayers in the case at bar clearly burdens their privilege of earning a living in the neighboring state of South Carolina.

We must next address the more difficult question of whether substantial reasons justify the discrimination and whether the degree of discrimination bears a close relationship to those reasons. The State must show that nonresidents are a peculiar source of the evil at which the statute is aimed. Toomer v. Witsell, supra. State tax classifications are ordinarily accorded deference. However, when the Privileges and Immunities Clause is implicated, the classification must fall if it has the effect of retaliating against citizens of other states who have no representation in the taxing state's

legislative halls. Austin v. New Hampshire, supra; Travis v. Yale & Towne Mfg. Co., 252 U. S. 60 (1920).

The appellant asserts that the proviso to §12-7-750 is not retaliatory but is designed to encourage sister states to enact legislation favoring South Carolina residents.² However, the goal of encouraging other states to enact reciprocal legislation does not bear a substantial relationship to the result of penalizing taxpayers like the Spencers who live in North Carolina and work in South Carolina. These taxpayers are not the source of the evil sought to be remedied by our legislature.

The Privileges and Immunities Clause was intended to prevent retaliation and

²In 1981, North Carolina enacted reciprocal legislation. 1981 N. C. Session Laws, Chapter 973, §§1, 2.

promote federalism. Therefore, denying nonresidents nonbusiness deductions initially allowed by the first paragraph of §12-7-750 and allowed for South Carolina residents who work in the State violates the Privileges and Immunities Clause.

It is not necessary to discuss the taxpayers' equal protection, due process, and commerce clause allegations.

The taxpayers next assert that they have attained only a hollow victory because the trial court refused to award them attorneys' fees. Code §12-47-270 provides, with limited exceptions, that in actions brought under §§12-47-220 or 12-47-230 no costs or disbursements shall be taxed in favor of either party. However, 42 U.S.C. § 1988 allows attorneys' fees to prevailing parties in 42 U.S.C. §1983 actions, in the trial court's

discretion.

The trial court did not address the § 1983 claim. The United States Supreme Court has not ruled that state courts are required to open their doors to § 1983 actions. See Martinez v. State of California, 444 U. S. 277 (1980); Maine v. Thiboutot, 448 U. S. 1 (1980).

Section 1983 does not provide for any substantive rights; it is remedial.

Chapman v. Houston Welfare Rights Organizations, 441 U. S. 600 (1979).

State remedies for asserting rights may not be circumvented by invoking § 1983. Backus v. Chilivis, 236 Ga. 500, 224 S. E. 2d 370 (1976). It may reasonably be inferred that the sole reason for alleging § 1983 was to justify the allowance of counsel fees. We do not believe this was contemplated by Congress when it enacted §§ 1983 and 1988. Brown

v. Hornbeck, 54 Md. App. 404, 458 A. 2d 900 (1983).

The decision of the trial court is, accordingly,

AFFIRMED.

LITTLEJOHN, C.J., NESS and GREGORY, JJ., and J. Woodrow Lewis, Acting Associate Justice, concur.

APPENDIX B

THE STATE OF SOUTH CAROLINA
 COUNTY OF GREENVILLE
 IN THE COURT OF COMMON PLEAS
 81-CP-23-3844

Roger L. Spencer and Shirley L. Spencer,
 Plaintiffs

v.

South Carolina Tax Commission, Charles N.
 Plowden, in his capacity as a member and
 as the Chairman of the South Carolina Tax
 Commission, Robert C. Wasson, in his
 capacity as a member of the South
 Carolina Tax Commission and John T.
 Weeks, in his capacity as a member of the
 South Carolina Tax Commission,
 Defendants

ORDER-October 29, 1982

Plaintiffs seek a refund of taxes paid
 under protest to the Defendants for the
 tax year 1980. The facts as I hereafter
 find them to be are undisputed. The suc-
 cess or failure of the claim depends upon
 my conclusions of law. For that reason,
 at the time appointed for the hearing on
 this matter no testimony was needed.

Necessary exhibits were placed in evi-
 dence and lengthy arguments were made by
 counsel for both parties. Briefs have
 been filed, and I have considered them
 fully. I find the following to be the
 salient facts of this case:

FINDINGS OF FACT

Plaintiffs are residents of North
 Carolina. The taxes in question were for
 the year 1980. The Plaintiffs resided in
 North Carolina during that entire year
 and their total income was earned in
 South Carolina. When the Plaintiffs
 filed their tax returns with the Defend-
 ants for the year 1980, they claimed
 Eight Thousand Three Hundred Ninety and
 16/100 (\$8,390.16) Dollars as itemized
 personal deductions on their Form 1001.
 The Defendants notified them that the
 deductions would not be allowed and that
 as a result the Plaintiffs owed One

Thousand Five Hundred Fifty-six and 78/100 (\$1,556.78) Dollars. The disallowance was based upon the fact that in that year North Carolina would not allow a South Carolina resident who earned income in North Carolina to claim those nonbusiness deductions on their North Carolina tax returns as a result of a North Carolina statute and its implementation by the Secretary of Revenue. §105-147(18)a General Statutes, North Carolina. §12-7-750 of the South Carolina Code of Laws of 1976, as amended, in its second paragraph provides as follows:

"Provided, however, that a nonresident individual shall not be permitted to apportion and allocate his state of principal residence unless his state of principal residence also permits similar apportionment and allocation of nonbusiness deductions by nonresident individuals filing returns in that state. The South Carolina Tax Commission shall promulgate necessary regulations to

effectuate the provisions of this proviso."

Upon the basis of that statute the deductions were disallowed. The Plaintiffs owed Five Hundred Ninety-three and 31/100 (\$593.31) Dollars. They paid that amount under protest by paying the difference in what had already been withheld and the amount of the alleged tax and advising the Defendants of their protest.

CONCLUSIONS OF LAW

This Court has jurisdiction of this matter under §12-47-220 of the 1976 Code of Laws of South Carolina, as amended. The Plaintiffs have met the criteria for bringing this action and the Defendants' arguments to the contrary are without merit.

Although the Defendants denied the deductions in question upon the grounds I have previously stated in the Findings of

Fact, after the lawsuit was instituted the defense changed to an attempt to interpret the first paragraph of §12-7-750 in a manner totally different from the Defendants' interpretation of previous years and different from its interpretation as evidenced by its Form 1001-F.

That paragraph simply means that non-resident taxpayers take that proportion of their total nonbusiness deductions as their South Carolina adjusted gross income bears to their total adjusted gross income. In the case of Plaintiffs, all their income is South Carolina income, so all nonbusiness deductions should be allowed under this statute.

The only basis upon which the deductions could be disallowed is the second paragraph of §12-7-750, and it is upon that basis that the disallowance was

originally made.

Plaintiffs argue that the second paragraph of §12-7-750 is unconstitutional under both the South Carolina and United States Constitution. I have made a diligent effort to decide this case without reaching the constitutional issue. That issue is unavoidable. The paragraph in question denies a nonresident deductions available to a resident and available to a nonresident if his resident state allows similar treatment to nonresidents earning income in his state of residence. It is an unequal treatment of nonresident taxpayers as compared to resident taxpayers and as such is a violation of Article IV, §2 cl. 1 of the United States Constitution. *Austin-vs-New Hampshire*, 420 US 656, 95 S. Ct. 1191, 1197 (1975); *Travis-vs-Yale & Towne Mfg. Co.*, 252 US 60, 40 S. Ct. 228 (1920). The second paragraph

18a

of §12-7-750 of the 1976 Code of Laws of South Carolina, as amended, is therefore unconstitutional and the Five Hundred Ninety-three and 31/100 (\$593.31) Dollars paid under protest by the Plaintiffs should be refunded forthwith.

Plaintiffs have consolidated actions under §12-47-220 of the 1976 South Carolina of Laws and an action under 42 USC 1983 and 1988. My conclusion is that §12-47-220 clearly provides a remedy to the Plaintiffs, and they have been successful in seeking that remedy as a result of this order. §12-47-220 clearly provides that no costs shall be taxed or allowed either party. I recognize that the Plaintiffs have incurred attorneys fees and other expenses which probably make the refund of their Five Hundred Ninety-three and 31/100 (\$593.31) Dollars a "tasteless victory". That is frequent-

19a

ly if not always the case in lawsuits for refund of taxes whether state or federal. Our legislature having limited the recoverable amount to the tax in question, it is not within the province of this Court to award attorneys fees or costs. It is therefore

ORDERED, that the Treasurer of the State of South Carolina pay to the Plaintiffs the sum of Five Hundred Ninety-three and 31/100 (\$593.31) Dollars. It is further

ORDERED, that the second paragraph of §12-7-750 of the 1976 Code of Laws, as amended, is hereby declared unconstitutional and as a result of this order is null, void and of no effect.

AND IT IS SO ORDERED.

FLORENCE, SOUTH CAROLINA

OCTOBER 29, A. D. 1982.

/s/WYLIE H. CALDWELL, JR.,
PRESIDING JUDGE

20a

THE STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
81-CP-23-3844

Roger L. Spencer and Shirley L. Spencer,
Plaintiffs

v.

South Carolina Tax Commission, Charles N.
Plowden, in his capacity as a member and
as the Chairman of the South Carolina Tax
Commission, Robert C. Wasson, in his
capacity as a member of the South
Carolina Tax Commission and John T.
Weeks, in his capacity as a member of the
South Carolina Tax Commission,
Defendants

AMENDED ORDER-November 9, 1982

WHEREAS, the original order in the
above matter, dated October 29, 1982,
found the amount of taxes in dispute to
be Five Hundred Ninety-three and 31/100
(\$593.31) Dollars and it has been brought
to the Court's attention by counsel for
the Plaintiffs that the amount in dispute
should have been Five Hundred Eighty-five
and 00/100 (\$585.00) Dollars; and

21a

WHEREAS, the attorneys for the
Defendants agree that Five Hundred
Eighty-five and 00/100 (\$585.00) Dollars
is the correct amount in dispute. It is
therefore

ORDERED, that the Order dated October
29, 1982 be and it is hereby amended to
correct this error and the South Carolina
Tax Commission shall pay that amount to
the Petitioners.

AND IT IS SO ORDERED.

FLORENCE, SOUTH CAROLINA

NOVEMBER 9, A. D. 1982.

/s/ WYLIE H. CALDWELL, JR.,
PRESIDING JUDGE

APPENDIX C

ADDITIONAL SUSTAINING GROUNDS OF
APPELLANTS/RESPONDENTS #4;
TRANSCRIPT OF RECORD ON APPEAL
TO THE SOUTH CAROLINA SUPREME COURT,
PAGES 160-61

4. The Trial Court correctly concluded attorneys' fees are not allowable but should have so concluded on the basis of an additional sustaining ground, such additional sustaining ground being that the existence of an adequate remedy and relief under §12-47-220 allows the Trial Court not to consider an additional cause of action under 42 U.S.C. 1983.

APPENDIX D

EXCEPTIONS OF RESPONDENTS/APPELLANTS
#2 AND #3; TRANSCRIPT OF RECORD ON
APPEAL TO THE SOUTH CAROLINA SUPREME
COURT, PAGES 161-62

2. The Trial Court committed error in ruling as a matter of law that the Plaintiffs were not entitled to costs and their reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988, in that, to the extent 42 U.S.C. § 1988 is inconsistent with § 12-47-270, the latter statute must yield under the Supremacy Clause of and the Fourteenth Amendment to the United States Constitution, and the Trial Court's conclusion that Section 12-7-750 violates Article IV, Section 2, Clause 1 of the United States Constitution necessarily means that Section 12-7-750 violates 42 U.S.C. § 1983.

3. The Trial Court committed error in ruling as a matter of law that the Plaintiffs were not entitled to costs and their reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988, in that the Supremacy Clause of and the Fourteenth Amendment to the United States Constitution prohibit the courts of the State of South Carolina from holding that a person may not assert a claim under 42 U.S.C. § 1983 in the courts of the State of South Carolina when another remedy exists under state law, particularly where the state law remedy does not provide the same scope of relief as does 42 U.S.C. §§ 1983 and 1988, and the Trial Court's conclusion that Section 12-7-750 violates Article IV, Section 2, Clause 1 of the United States Constitution necessarily means that Section 12-7-750 violates 42 U.S.C. § 1983.

APPENDIX E

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article VI, Clause 2 of the Constitution of the United States provides in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1341 provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 provides in pertinent part:

In any action or proceeding to enforce a provision of section... 1983...of this title...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

S.C. Code Ann. § 12-47-220 provides:

Any person paying any taxes under protest may at any time within thirty days after making such payment, but not afterwards, bring an action against the county treasurer or the Commission, as the case may be, for the recovery thereof, in the case of a county treasurer in the court of common pleas for the county in which such taxes were payable and in the case of the Commission in any county having jurisdiction, and, if it be determined in such action that such taxes and penalties, if any, were wrongfully or illegally collected for any reason going to the merits, the court before whom the case is tried shall certify of record that such taxes were wrong-

fully collected and ought to be refunded and thereupon the county treasurer shall refund the taxes and penalties, if any, so paid to him or, in the case of any taxes levied or assessed by the Commission shall issue its order to the State Treasurer to refund such taxes and penalties, if any, so paid, which shall be paid in preference to other claims against the State Treasury.

S.C. Code Ann. §12-47-270 provides:

In any action brought under the provisions of § 12-47-220 or 12-47-230, no costs or disbursements shall be taxed or allowed in favor of either party, except for the service of process and procuring the attendance of witnesses.

APPENDIX F

STATES WHICH HAVE RECOGNIZED
CONCURRENT JURISDICTION OVER
§ 1983 CLAIMS

- Arizona - New Times, Inc. v. Arizona Board of Regents, 110 Ariz. 367, 519 P.2d 169, 176 (1974);
- Colorado - Espinoza v. O'Dell, 633 P.2d 455, 460 n.2 (Colo. 1981);
- Connecticut - Vason v. Carrano, 31 Conn. Sup. 338, 330 A.2d 98 (1974);
- District of Columbia - Long v. District of Columbia, 469 F.2d 927, 937 (D.C. Cir. 1972);
- Illinois - Alberty v. Daniel, 25 Ill. App. 3d 291, 323 N.E.2d 110, 114 (1974);
- Kansas - Cooper v. Hutchinson Police Department, 6 Kan. App. 2d 806, 636 P.2d 184, 186 (1981);

- Kentucky - Scott v. Campbell County Board of Education, 618 S.W.2d 589, 590 (Ky. 1981);
- Louisiana - Ricard v. State, 390 So.2d 882, 883-84 (La. 1980);
- Maine - Thiboutot v. State, 405 A.2d 230, 235 (Me. 1979), aff'd, 448 U.S. 1 (1980);
- Maryland - De Bleecker v. Montgomery County, 48 Md. App. 455, 427 A.2d 1075, 1077 (1981), rev'd on other grounds, 292 Md. 498, 438 A.2d 1348 (1982);
- Massachusetts - Santana v. Registrars of Voters of Worcester, 425 N.E.2d 745, 749 (Mass. 1981);
- Michigan - Dickerson v. Warden, Marquette Prison, 99 Mich. App. 630, 298 N.W.2d 841, 843 (1980);

Missouri - Shapiro v. Columbia Union

National Bank and Trust Co., 576
S.W.2d 310, 316 (Mo. 1978), cert.
denied, 444 U.S. 831 (1979);

New Hampshire - MBC, Inc. v. Engel, 119

N.H. 8, 397 A.2d 636, 637 (1979);

New Jersey - Endress v. Brookdale

Community College, 144 N.J. Super.
109, 364 A.2d 1080, 1092 (1976);

North Carolina - Snuggs v. Stanly County

Department of Public Health, 63 N.C.
App. 86, 303 S.E.2d 646, 647 (1983);

North Dakota - Kristensen v. Strinden,

343 N.W.2d 67, 71 (N.D. 1983);

Ohio - Jackson v. Kurtz, 65 Ohio App. 2d

152, 416 N.E.2d 1064, 1067 (1979);

Oklahoma - Powell v. Seay, 553 P.2d 161,

164 (Okla. 1976);

Oregon - Rosacker v. Multnomah County, 43

Or. App. 583, 603 P.2d 1216, 1218
(1979);

Pennsylvania - Commonwealth ex rel.

Saunders v. Creamer, 464 Pa. 2, 345
A.2d 702, 703 n.3 (1975);

Rhode Island - Carvalho v. Coletta, 457

A.2d 614, 617 (R.I. 1983);

Utah - Kish v. Wright, 562 P.2d 625,

627 (Utah 1977);

Washington - State v. Tidwell, 32 Wash.

App. 971, 651 P.2d 228, 230 n.2
(1982);

West Virginia - Harrah v. Leverette, 271

S.E.2d 322, 332 (W.Va. 1980); and

Wyoming - Board of Trustees v. Holso, 584

P.2d 1009, 1017 (Wyo. 1978).

NO. 84-249

FILED

SEP 15 1984

ALEXANDER L. STEVENS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ROGER L. SPENCER AND SHIRLEY L.
SPENCER,

Petitioners,

vs.

SOUTH CAROLINA TAX COMMISSION,
CHARLES N. PLOWDEN, IN HIS CAPACITY
AS CHAIRMAN OF THE SOUTH CAROLINA
TAX COMMISSION, ROBERT C. WASSON,
IN HIS CAPACITY AS A MEMBER OF THE
SOUTH CAROLINA TAX COMMISSION AND
JOHN T. WEEKS, IN HIS CAPACITY AS A
MEMBER OF THE SOUTH CAROLINA TAX
COMMISSION,

Respondents.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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18P

QUESTION PRESENTED

If a taxpayer asserts a cause of action to recover state income taxes in state court under a plain and adequate state remedy which allows the raising of any and all constitutional objections, may the state court properly decline to hear a cause of action under 42 U. S. C. §1983 brought in the same suit?

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OPINION AND ORDER IN PRIOR
PROCEEDINGS

The opinion and order in prior court proceedings have been adequately set forth in the Petition for Writ of Certiorari and nothing further is added here.

JURISDICTION

Jurisdiction is properly being sought under 28 U.S.C. §1257(3) but respondents respectfully urge that the Petition be denied since a decision of this Court is not warranted in this matter.

CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED

The constitutional provisions and statutes involved have been adequately set forth in the Petition for Writ of Certiorari and nothing further is added here.

STATEMENT OF THE CASE

The petitioners, the Spencers, were residents of North Carolina who earned South Carolina income

for the 1980 tax year and filed a South Carolina return which claimed nonbusiness itemized deductions. After audit such deductions were disallowed resulting in a South Carolina tax liability of \$585.00. The disallowance was found by the South Carolina Supreme Court to be based upon an unconstitutional statute since such violated the Privileges and Immunities Clause, Article IV, §2, Clause 1 of the United States Constitution. However, the South Carolina Supreme Court found that the taxpayers had obtained an adequate and complete remedy by payment under protest and suit in the circuit court via §12-47-220. Since the state remedy was complete and adequate for the taxpayers' action, the court found no need to address the §1983 action and, therefore, declined to hear the matter under §1983. Such was a correct decision.

ARGUMENT SUMMARY

The issue sought to be reviewed by the petitioners is a narrow one with limited applicability only to tax refund suits sought under §1983 in state court.

South Carolina's decision is consistent with prior decisions of this Court and there is no conflict with the decisions of the state courts that have considered the use of a §1983 claim in a state tax refund matter. Since the South Carolina decision is consistent with existing law, no review by this Court is warranted.

ARGUMENT

1. South Carolina's Decision is Consistent With Prior Opinions Of This Court.

The issue petitioners seek to bring before this Court is not the broad-based assertion made by the petitioners that South Carolina has now opted to refuse to entertain a §1983 action in all matters. (See Petition for Writ of Certiorari at page 16.) Such a conclusion is incorrect and without support since it is well established that state courts have concurrent jurisdiction and may entertain actions brought under 42 U.S.C. §1983. Maine v. Thiboutot, 448 U. S. 1, 3 n. 1, 100 S. Ct. 2502, 2503 n. 1 (1980); Martinez v. California, 444 U. S. 277, 283 n. 7, 100 S. Ct. 553, 558 n. 7 (1980). The South Carolina Supreme

Court recognized such in its opinion by citing Martinez and Thiboutot. (See Petition for Writ of Certiorari, Appendix A at page 10a.) The issue before the South Carolina court was a very limited, narrow question of the effect of pursuing an adequate state tax refund remedy while also pursuing in the same suit a cause of action under 42 U.S.C. §1983. The South Carolina Supreme Court applied well accepted law that the mere existence of jurisdiction does not mean that it must be exercised and does not mean that grounds may not be shown to persuade the court to restrain its admitted jurisdiction. Kansas City Southern R. Co. v. United States, 282 U. S. 760, 51 S. Ct. 304, 306, 75 L. Ed. 684 (1951). Analogous opinions of this Court have expressly allowed state courts to decline jurisdiction of federal claims where sufficient reasons may be shown. See Douglas v. New York, N. H. and H.R.R., 279 U. S. 377 (1929), Missouri ex rel Southern Railway v. Mayfield, 340 U. S. 1 (1950) and Herb v. Pitcairn, 324 U. S. 117 (1945). In the instant case, the South

Carolina Supreme Court found sufficient reason since the taxpayers had pursued and obtained a plain, speedy and efficient remedy under §12-47-220 of the South Carolina Code of Laws of 1976, as amended, and Congress has clearly expressed its intent not to require states to entertain §1983 actions seeking refunds of state taxes. Fair Assessment In Real Estate Association v. McNary, 454 U. S. 100, 102 S. Ct. 177 (1981), demonstrated that §1983 could not be used to dispense with a taxpayer's requirement of pursuing the plain, speedy and efficient state remedies dictated by 28 U.S.C. §1341.

The Spencers present the simplistic view that since arguably the Supremacy Clause may constitutionally give Congress the authority to require a state court to hear a federal cause of action, Congress has exercised such power to its fullest extent. Such an argument ignores the clear intent expressed by Congress to limit its power by its enactment of 28 U.S.C. §1341. This section shows congressional intent to allow a

state to handle its own fiscal affairs unimpeded by federal causes of action so long as there is a plain, speedy and efficient remedy in state court. Since Congress has chosen to demand that state tax suits be pursued in state court pursuant to the state's plain, speedy and efficient remedies, it cannot logically be argued that Congress has demanded that §1983 suits be heard in state court for tax refund suits. To conclude that §1983 actions are required to be heard in state tax refund suits would be to directly contradict this Court's decision in Fair Assessment, supra, since comity would be undermined to have a federal cause of action forced upon the state judicial system.

Likewise, there is no conflict with South Carolina's decision and that of this Court in Patsy v. Board of Regents of State of Florida, 457 U. S. 496, 102 S. Ct. 2557 (1982). There this Court held that exhaustion of administrative remedies at the state level prior to instituting an action under §1983 in

federal court, is not required where congressional intent is consistent with such refusal to defer jurisdiction. Patsy, supra, at 101 S. Ct. 2557, 2561. This Court then found that exhaustion requirements were specifically provided for in 42 U.S.C. §1997e and that Congress there expressed its intent to require exhaustion.

Congress has expressed its intent to require exhaustion of state remedies in a §1983 action by enactment of 28 U.S.C. §1341. Fair Assessment, supra, 102 S. Ct. at 196-197, concurring opinion of Justice Brennan. Such a view is consistent with the long held opinions of this Court acknowledging that the modes adopted by the states to enforce taxes should be interfered with as little as possible. Dows v. City of Chicago, 11 Wall. 108, 110, 20 L. Ed. 65 (1870). To require a state court to entertain a §1983 action in a state tax refund suit where there is a plain remedy creates interference where none is warranted.

South Carolina's decision is not inconsistent with Mondou v. New York, New Haven & Hartford Railroad Co., 223 U. S. 1, 32 S. Ct. 169 (1912), McKnett v. St. Louis & S. F. Ry. Co., 292 U. S. 230, 54 S. Ct. 690 (1934) or Testa v. Katt, 330 U. S. 386, 67 S. Ct. 810 (1947). Mondou, supra, held that a state could not decline to entertain a federal cause of action on the ground that the policy behind the act of Congress was inconsistent with the state's policy. Such a position merely discriminated against the federal cause of action. McKnett, supra, held that Alabama could not deny jurisdiction of a federal cause of action based solely upon the fact that the suit was brought under federal law. Again such would discriminate against the federal cause of action. Finally, Testa, supra, held that the state court could not refuse to hear a federal cause of action where the state asserted that to do so would be against the state's policy to not enforce nonforum-created penal claims. Such a ground again dis-

criminated against the federal claim. In the instant case there is no discrimination against the federal cause of action since Congress has specifically authorized by its intent expressed in 28 U.S.C. §1341 the states to exercise their discretion in hearing §1983 suits seeking state tax refunds so long as the state provides an adequate remedy. A payment under protest with a suit for refund even without interest being paid is an adequate remedy. California v. Grace Brethren Church, 457 U. S. 393, 102 S. Ct. 2498 (1982). South Carolina's refund route is adequate.

2. There Are No Conflicts On This Issue In The State Courts.

Not only do opinions of this Court not conflict with the decision of the South Carolina Supreme Court, but of the three states that have considered a state tax action in state court involving a §1983 claim, all have found the state remedy to be adequate and have exercised their discretion in not hearing the §1983 claim. South Carolina is one of the

three with Georgia and Mississippi being the other two. In Backus v. Chilivis, 236 Ga. 500, 224 S. E. 2d 370 (1976), the Georgia Supreme Court was faced with a class action challenging the tax digest for Glynn County for 1974. The tax digest was the assessed value determined for property within Glynn County. It was prepared by the H. L. Yoh Company pursuant to a contract with Glynn County. The Assessments were challenged as being unequal and, therefore, unconstitutional. The plaintiff sought to assert a claim under §1983 but was unsuccessful as the court, after noting the requirements of 28 U.S.C. §1341, held as follows:

"We hold that the procedures provided by Georgia statutes for resolving ad valorem tax disputes bar taxpayers from instituting a §1983 action founded only on the claim that the assessments are unequal. A complete remedy for such a defect in a tax digest is already provided by state law as recognized in Tax Assessors v. Chitwood [235 Ga. 147, 218 S. E. 2d 759]. The overriding interests of the state in an efficient, expeditious and non-disruptive resolution of ad valorem tax disputes would be seriously im-

paired, if not destroyed, by the allowance of such suits." Beckus v. Chilivis, supra, p. 374.

In State Tax Commission v. Fondren, 387 So.

2d 712 (Miss. 1980), cert. denied 450 U. S. 1040 (1981), Mississippi found that 28 U.S.C. §1341 gave the court the right to impose the exhaustion of state remedies rule. Just as in the instant case, attorneys' fees were denied since the §1983 action was properly dismissed.

CONCLUSION

No review of the decision of the South Carolina Supreme Court is warranted since it is a narrow decision correctly decided and is consistent with opinions of this Court and decisions of other state courts. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,


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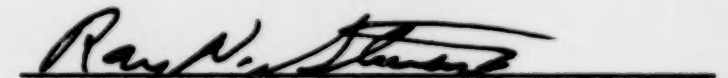
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September 12, 1984

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of September, 1984, three copies of a Brief In Opposition To Petition For Writ of Certiorari were mailed by depositing same in the United States Post Office at Columbia, South Carolina, with first class postage prepaid, addressed to Henry L. Parr, Jr. and Eric B. Amstutz, as Counsel of Record for Petitioners, at Post Office Box 10207, 44 East Camperdown Way, Greenville, South Carolina, 29603.



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SEP 28 1984

ALEXANDER L. STEVA
CLERK

3
No. 84-249

In the Supreme Court of the United States

October Term, 1984

ROGER L. SPENCER AND SHIRLEY L. SPENCER,
PETITIONERS

v.

SOUTH CAROLINA TAX COMMISSION, CHARLES N.
PLOWDEN, IN HIS CAPACITY AS A MEMBER AND
AS THE CHAIRMAN OF THE SOUTH CAROLINA TAX
COMMISSION, ROBERT C. WASSON, IN HIS
CAPACITY AS A MEMBER OF THE SOUTH
CAROLINA TAX COMMISSION AND JOHN T.
WEEKS, IN HIS CAPACITY AS A MEMBER OF THE
SOUTH CAROLINA TAX COMMISSION,
RESPONDENTS

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA**

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II.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Respondents' brief in opposition to the petition for certiorari asserts a number of fallacious arguments.

1. Respondents contend, at pages 5 and 6 of their brief, that the Tax Injunction Act, 28 U.S.C. § 1341, and the principle of comity generally permit "a state to handle its own fiscal affairs unimpeded by federal causes of action." This contention is wrong. Section 1341 and comity do not provide state courts an exemption from federal causes of action. They only limit the power of federal courts.

Rosewell v. LaSalle National Bank, 450 U.S. 514, 101 S. Ct. 1221 (1981), shows that respondents' interpretation of § 1341 is erroneous. In Rosewell this

Court stated that the Tax Injunction Act simply "transfers" a class of federal claims to state courts as long as state procedures are adequate. There is no hint in that case that Congress exempted state courts from any federal claim. Id. 450 U.S. at 515 n.19, 101 S. Ct. at 1230 n.19. The Court made it clear that under § 1341, to avoid federal court interference, a state must afford "'full protection to ... federal rights.'" Id. 450 U.S. at 512-513, 101 S. Ct. at 1229, quoting from Hillsborough v. Cromwell, 326 U.S. 620, 625, 66 S. Ct. 445, 449 (1946). In Rosewell, this Court found that the Illinois state court procedures under consideration were adequate because there was "no question" that the state courts would "hear and decide any federal claim" including any claim of a "federal

right" to receive interest on taxes withheld. Id. at 450 U.S. 515, 517, 101 S. Ct. 1230, 1231.¹

Similarly, Fair Assessment in Real Estate v. McNary, 454 U.S. 100, 102 S. Ct. 177 (1981), shows that respondents also misconstrue the principle of comity. Respondents contend that it would directly contradict McNary "to have a federal cause of action forced upon the state judicial system." Respondents' brief at 6. On the contrary, McNary acknowledges that states are exempt by virtue of comity from federal court interference in matters of taxation only "'where the federal rights of the persons [involved can] ... otherwise be preserved

¹It was clear in Rosewell that the taxpayers could have brought a § 1983 action in state court. 450 U.S. at 511 n.14, 101 S. Ct. at 1228 n.14.

unimpaired.'" 100 U.S. at 109, 102 S. Ct. at 182, quoting Boise Artesian Water Co. v. Boise City, 213 U.S. 276, 282, 29 S. Ct. 426, 428 (1909). McNary, like Rosewell, acknowledges that state courts are expected to enforce federal rights even when state taxation is involved.

McNary did not exempt state courts from § 1983 actions; in fact, it discussed the adequacy of state remedies and expressly noted that the plaintiff in that case could assert a § 1983 action in state court. 100 U.S. at 116-117, 102 S. Ct. at 186. McNary also acknowledged implicitly that § 1983 provides a federal right to certain remedies. The Court said that "by its terms [§ 1983] gave a federal cause of action to prisoners, taxpayers, or anyone else who was able to prove that his constitutional or federal

rights had been denied by any State." [emphasis added]. 100 U.S. at 103-104, 102 S. Ct. at 179. Section 1983, in conjunction with § 1988, also provides a federal right to attorney's fees. Maine v. Thiboutot, 448 U.S. 1, 11 and n.12, 100 S. Ct. 2502, 2508 and n.12 (1980). The state courts of South Carolina have wrongly denied the Spencers that right.

2. Respondents also contend that the lower courts' refusal to entertain the Spencers' § 1983 claim is justified by the exhaustion of state remedies principle proposed in Mr. Justice Brennan's concurring opinion in McNary, 100 U.S. at 133-137, 102 S. Ct. at 194-197. Respondents' brief at 6-7. Respondents, however, misconstrue Justice Brennan's opinion. That opinion concluded only that § 1341 implicitly requires exhaus-

tion of state administrative remedies, not state judicial remedies. 100 U.S. at 134 n.22, 102 S. Ct. at 195 n.22. The Spencers have exhausted their administrative remedies, and respondents do not contend otherwise.

3. On page 4 of respondents' brief, the respondents contend that the South Carolina court applied "well accepted law" in refusing to entertain the Spencers' claims under §§ 1983 and 1988. Respondents insist that the existence of remedies under state law justifies the state court's refusal to vindicate the Spencers' right to attorney's fees under §§ 1983 and 1988. Respondents' brief at 5. None of the decisions on which the respondents rely, however, supports or even considers the respondents' argument.

Three of the decisions invoked by

the respondents, Douglas v. New York, N.H. & H.R.R., 279 U.S. 377, 49 S. Ct. 355 (1929), Missouri ex rel. Southern Railway v. Mayfield, 340 U.S. 1, 71 S. Ct. 1 (1950) and Herb v. Pitcairn, 324 U.S., 117, 65 S. Ct. 459 (1945), involved situations where the plaintiff had sought to bring a federal claim into a state court which lacked jurisdiction over the claim because of the residence of the parties or the place where the claim arose. In each case this Court recognized that a state court is entitled to refuse to hear a federal claim when the court's jurisdiction is inadequate. The other case, Kansas City Southern R. Co. v. United States, 282 U.S. 760, 51 S. Ct. 304 (1931), held only that a district court may stay a lawsuit attacking an order of the Interstate Commerce Commis-

sion while another district court resolves an identical issue in another lawsuit. One of the cases on which respondents rely, Herb v. Pitcairn, supra, in fact acknowledges that a state court has a duty to "take cognizance" of a federal cause of action when "its ordinary jurisdiction" is appropriate and that state courts are not free to discriminate against federal claims. 324 U.S. at 120, 123, 65 S. Ct. at 460-461, 462.

Despite respondents' arguments to the contrary at page 8 of respondents' brief, the decision below is clearly contrary to the opinions of this Court discussed at pages 24-29 of the petition for certiorari. The respondents' contention that Congress has authorized states to reject § 1983 suits seeking tax refunds is based on respondents' erroneous interpretation of § 1341 discussed earlier in

section 1 of this brief above. By refusing to award the attorney's fees to which the Spencers are entitled under §§ 1983 and 1988, the state court below has clearly discriminated against the Spencers' federal rights.²

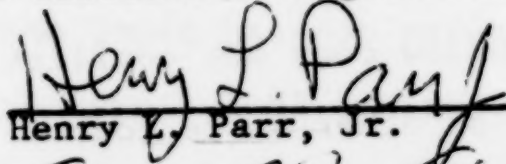
²On page 9 of respondents' brief, respondents cite California v. Grace Brethren Church, 457 U.S. 393, 102 S. Ct. 2498 (1982), for the proposition that a payment under protest with a suit for refund without interest is an adequate remedy under § 1341. The Grace Brethren Church opinion appears to have been cited in error. It states in footnote 31 that the California tax scheme under consideration in Grace Brethren Church required the state to pay interest. Respondents may have intended to cite Rosewell v. LaSalle National Bank, 450 U.S. 503, 101 S. Ct. 1221 (1981), which did involve a situation where the state refused to pay interest. Even Rosewell, however, does not support the respondents' position. In Rosewell, this Court noted that it appeared that the petitioner was able to assert in state court any "federal right" that she may have had to receive interest. 450 U.S. at 515, 101 S. Ct. 1230. In the case at hand, the Spencers clearly have an explicit federal right under §§ 1983 and 1988 to receive attorney's fees. The court below has refused to vindicate or even consider that right. Nothing in § 1341 can be said to sanction a refusal to vindicate a federal right specifically granted to the Spencers by Congress.

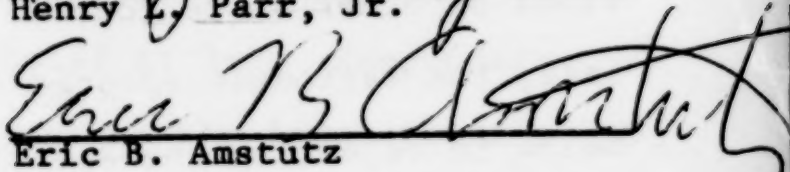
4. Respondents assert that the South Carolina Supreme Court has not refused broadly to entertain § 1983 actions. Respondents' brief at 3-4. Respondents, however, misconstrue the lower court's opinion. As pointed out on pages 12-13 and 16 of the petition for certiorari, the rationale adopted by the lower court closes South Carolina courts to most § 1983 actions. There is no language in the opinion limiting it to tax cases. Indeed, the court below pointed out that this Court "has not ruled that state courts are required to open their doors to § 1983 actions." Appendix to petition for certiorari at 10a. Even if the decision below were to be limited to tax cases, it would still conflict with opinions of this Court on issues of great significance.

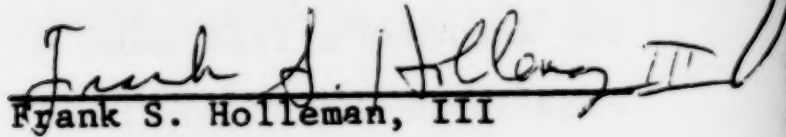
5. Respondents contend that the decision below does not conflict with decisions of other state courts. Nevertheless, the rationale adopted by the court below in rejecting the Spencers' claim for attorney's fees under §§ 1983 and 1988 is in direct conflict with that of the decisions discussed on pages 17-21 of the petition for certiorari. Even if the South Carolina Supreme Court had attempted to confine its opinion to tax cases, as did the courts in Georgia and Mississippi, its holding would conflict with decisions by the state courts which have recognized their constitutional duty to entertain claims under §§ 1983 and 1988.

For the reasons expressed above, the petitioners respectfully request that the

petition for certiorari be granted.


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FILED

OCT 30 1984

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No. 84-249

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROGER L. SPENCER AND SHIRLEY L. SPENCER,
PETITIONERS,

v.

SOUTH CAROLINA TAX COMMISSION, CHARLES N.
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**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA**

JOINT APPENDIX

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PETITION FOR CERTIORARI
FILED AUGUST 13, 1984
CERTIORARI GRANTED OCTOBER 9, 1984

3pp

The opinion of the trial court is reproduced in the Petition for Writ of Certiorari at page 12a. The opinion of the South Carolina Supreme Court is reproduced in the Petition for Writ of Certiorari at page 1a.

The docket sheet contains no relevant entries. Below is a list of the relevant dates:

May 15, 1981	Action commenced by service of Summons and Complaint.
October 29, 1982	Trial court order declaring the second paragraph of § 12-7- 750 of the 1976 Code of Laws of South Carolina, as amended, unconstitutional and refusing to consider

2

claim for attorney's
fees under 42 U.S.C.
§§ 1983 and 1988.

May 15, 1984

South Carolina Supreme
Court's order affirm-
ing trial court.

Respectfully submitted,

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(5)
No. 84-249

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROGER L. SPENCER, *et ux*,
Petitioners,
v.

SOUTH CAROLINA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

**BRIEF OF
THE COUNCIL OF STATE GOVERNMENTS,
THE UNITED STATES CONFERENCE OF MAYORS,
THE NATIONAL ASSOCIATION OF COUNTIES,
THE NATIONAL LEAGUE OF CITIES, AND
THE INTERNATIONAL CITY MANAGEMENT
ASSOCIATION AS AMICI CURIAE IN SUPPORT
OF RESPONDENTS**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-249

ROGER L. SPENCER, *et ux*,
Petitioners,
v.
SOUTH CAROLINA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
THE UNITED STATES CONFERENCE OF MAYORS,
THE NATIONAL ASSOCIATION OF COUNTIES,
THE NATIONAL LEAGUE OF CITIES, AND
THE INTERNATIONAL CITY MANAGEMENT
ASSOCIATION AS AMICI CURIAE IN SUPPORT
OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The *amici* are organizations that represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of such governments. This case presents legal issues of great importance concerning the authority of these governments with respect to their local systems of taxation.

The power to tax is central to the states' positions as separate sovereigns. To function as separate sovereigns, the states require a measure of independence and control

over the remedies available to litigants who challenge a system of state taxation as unconstitutional. Petitioners in this case, however, assert that a state court must entertain a challenge under 42 U.S.C. § 1983 to a state tax provision, even though petitioners' constitutional challenges to the provision were heard and remedied under state law. Petitioners argue that 42 U.S.C. §§ 1983 and 1988 establish a federal right to the remedy of attorneys' fees. Petitioners' argument, if adopted by this Court, would have serious and potentially far-reaching effects on state and local governments, both in terms of funding challenges to state tax systems through the provision of attorneys' fees and also in terms of the future imposition of remedies under § 1983 with respect to such challenges. *Amici* contend that Congress has not evidenced any intent to impose a federal remedial scheme for challenges to the state tax system through §§ 1983 and 1988 and that the decision of the South Carolina Supreme Court should be upheld.

STATEMENT OF THE CASE

Petitioners, residents of North Carolina, challenged a South Carolina tax provision precluding out-of-state residents from claiming certain deductions against income which were permitted to in-state residents. Their suit was filed in a South Carolina trial court under both South Carolina's tax refund statute, S.C. Code Ann. § 12-47-220, and under 42 U.S.C. § 1983. The South Carolina trial court and, subsequently, the South Carolina Supreme Court held that the state tax provision violated the privileges and immunities clause of the United States Constitution, Article IV, § 2, clause 1, and awarded petitioners the remedy provided under state law of a tax refund. South Carolina declined to exercise jurisdiction under 42 U.S.C. § 1983, however, since the court concluded that it had already provided petitioners their state law remedy for the constitutional challenge raised under § 1983. The only element added by petitioners'

claim under § 1983 was a claim for attorneys' fees under 42 U.S.C. § 1988. The South Carolina Supreme Court concluded that petitioners could not avoid, through the mechanism of pleading a § 1983 cause of action, the state restrictions on the availability of attorneys' fees in challenges to the state tax system.

SUMMARY OF ARGUMENT

This Court has previously recognized that 42 U.S.C. §§ 1983 and 1988 may be supplanted by alternative remedial provisions established by Congress. See *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith v. Robinson*, 104 S. Ct. 3457 (1984). The Tax Injunction Act, 28 U.S.C. § 1341, constitutes such an alternative remedial scheme. The Act evidences a federal policy of deferring to state remedies in matters relating to a state's administration of its own tax system. The State of South Carolina, consistent with the Tax Injunction Act, provided a "plain, speedy and efficient remedy" to petitioners in this case, addressing and resolving all federal constitutional issues presented. Having provided an adequate remedy under both state and federal law, the state court's decision to decline consideration of petitioners' §§ 1983 and 1988 claims was appropriate and consistent with federal policy.

ARGUMENT

The Supreme Court has left open the issue of whether a state court must entertain an action brought under § 1983, 42 U.S.C. § 1983. *Martinez v. State of California*, 444 U.S. 277, 284 n. 7 (1980). But the issue before the Court in this case is not whether a state court is free under all circumstances to decline entertaining a § 1983 action, but rather, whether a state court has such authority in the context of a challenge to its state's tax system. The resolution of this latter issue can be found in an analysis of congressional intent. There is no immutable right to have a court, whether state or federal, adjudicate a § 1983 claim. Section 1983 "is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended." *Smith v. Robinson*, 104 S.Ct. 3457, 3469-70 (1984).

Here, analysis of congressional intent reveals two salient facts: On the one hand, there is little evidence in either the language or legislative history of §§ 1983 and 1988 to indicate a congressional intent to require states to entertain such actions, and no evidence of such an intent with respect to challenges to state tax provisions. On the other hand, there is compelling evidence that Congress acknowledged and affirmed the imperative need of a state to administer its own tax system and intended for litigants to rely on their state remedies, provided that those remedies are "plain, speedy and efficient." 28 U.S.C. § 1341 (the "Tax Injunction Act").

A. Sections 1983 and 1988 Do Not Evidence a Congressional Intent To Require States To Entertain a § 1983 Claim Relating to Its System of Taxation

Section 1983 itself does not contain any explicit congressional directive requiring state courts to entertain all Section 1983 actions. *Cf. Testa v. Katt*, 330 U.S. 386 (1947) (where Congress specifically provided that a treble

damage action could be brought in any court of "competent jurisdiction," and the Supreme Court held that state courts were not free to decline to entertain such actions). The lack of such an explicit directive is consistent with the historical background of the Civil Rights Acts. The primary intent of § 1983 was to "afford a federal right in federal courts." *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (emphasis added). The dominant concern of the Reconstruction Congress was the state courts' failure to administer justice even-handedly, and § 1983 and its companion jurisdictional provisions were intended to redress that problem by providing a federal forum. *Id.* As the Court has noted, "[a] pervasive sense of nationalism led to enactment of the Civil Rights Act of 1871," and with the enactment four years later of the Judiciary Act of 1875, "the lower federal courts 'ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Steffel v. Thompson*, 415 U.S. 452, 465 (1974) (emphasis in original) (citation omitted). While this does not mean that jurisdiction over § 1983 claims was intended to rest exclusively in the federal courts, *see, e.g., Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982), it does mean that no all-encompassing federal directive to the states can be read into the section.¹

As with § 1983, the language of § 1988 contains no explicit requirement mandating state courts to consider an award of attorneys' fees in all circumstances. The legislative history of the section, once again, indicates

¹ It should be noted that the Supreme Court decisions preceding the enactment of § 1983 held that state courts entertained federal actions solely as a discretionary "matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution." *Kentucky v. Dennison*, 24 How. 66, 109 (1861).

that Congress was focusing on the award of attorneys' fees in *federal courts*. The Senate Report accompanying the legislation stated that the purpose of the bill was to "give the federal courts discretion to award attorneys' fees to prevailing parties in suit brought to enforce the civil rights acts which Congress has passed since 1866." S. Rep. No. 1011, 94th Cong., 2d Sess., 1 (1976), reprinted in 1976 U.S. Code Cong. & Adm. News 5908, 5910 (emphasis added). The Report goes on to state that "[t]his bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees . . ." *Id.* at p. 6 (emphasis added). Although attorneys' fees are available in state court pursuant to § 1988, when the state court has entertained a § 1983 action, see *Maine v. Thiboutout*, 448 U.S. 1, 10-12 (1980), Congress clearly disclaimed any intent to establish a "startling new remedy." A requirement that states provide for attorneys' fees as part of the administration of their tax systems would impose the very type of startling new remedy that Congress explicitly disavowed.

That Congress did not intend to impose such a remedy for state tax systems is evidenced by its treatment of the federal tax system. Congress acted with great circumspection in providing for attorneys' fees in connection with litigation with the Internal Revenue Service (IRS). In 1976, when the attorneys' fee provision was added to § 1988, Congress provided that attorneys' fees would be available for litigation involving the IRS in only a narrow subset of cases, specifically not including tax refund suits (which are a typical avenue for taxpayer redress in the federal system, analogous to petitioners' refund suit in this case). See P.L. No. 94-559, 90 Stat. 2461; *Key Buick Co. v. C.I.R.*, 613 F.2d 1306 (5th Cir. 1980); *Aparacor, Inc. v. United States*, 571 F.2d 552 (Ct. Claims 1978); *Kipperman v. C.I.R.*, 622 F.2d 431 F.2d (9th Cir.

1980). Congress subsequently removed the attorneys' fee provision relating to the IRS from § 1988 and modified it substantially. The current provision, contained in 26 U.S.C. § 7430, limits the amount recoverable and requires, as a condition for eligibility for the fee, that the litigant establish that the IRS's position was "unreasonable"; furthermore, the provision was made subject to a "sunset" clause, which provides for its expiration in 1985.

Congress's care in limiting the availability of attorneys' fees in litigation with the IRS suggests that, had Congress intended to require such a remedy in civil rights litigation against state revenue laws, there would have been some record of its consideration and determination. As Congress clearly recognized with respect to the federal tax system and the IRS, the provision of attorneys' fees may have a disruptive effect on the tax system and may also present a significant fiscal burden. An intent to disrupt the state tax system is not evident in any of the Congressional deliberations on § 1988 and should not lightly be implied.

Standing alone, it is doubtful that Congress's enactment of these general civil rights provisions would supply sufficient indicia of congressional intent to impose federal requirements on the remedies established by the states for taxpayer claims. "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954). In the absence of clear congressional intent to the contrary, this "general rule" applies, and, as Professor Hart noted, its application necessarily entails "differences in remedy and procedure" among federal and state courts. *Id.* As long as the state court does not discriminate against the federal interest, the application of differential remedial provisions is an appropriate reflection of the sovereignty of both the federal and state

systems. Compare *McKnett v. St. Louis and San Francisco Ry. Co.*, 292 U.S. 230 (1934) with *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1920).

In this case, there was no discrimination against the federal interest. South Carolina law uniformly precludes an award of attorney fees in state tax litigation. S.C. Code Ann. § 12-47-270. Furthermore, it cannot be said that the state's failure to award attorneys' fees strikes at the core of the federal right involved. Although Congress certainly stated that the provision for an award of fees was an aspect of the remedial scheme for the vindication of civil rights, see S. Rep. No. 1011, *supra*, at 6, it did not establish attorneys' fees as a matter of right, but rather provided for it as a discretionary remedy. 42 U.S.C. § 1988. South Carolina's refusal to implement such a discretionary federal remedy cannot reasonably be viewed as a threat to the Supremacy Clause.²

Petitioners place great reliance on the Court's decision in *Testa v. Katt*, *supra*. It is true that *Testa* "reveals that the Federal government has some power to enlist a branch of state government—there the judiciary—to further federal ends." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 762 (1982). But the circumstances presented in *Testa* were markedly different from those here. In *Testa*, the Court was faced with a federal statute that applied to non-governmental activity—private business activities subject to federal regulation under the Emergency Price Control Act. *Testa v. Katt*, *supra*, 330 U.S. at 387. This Court has consistently recognized the preeminent role given to federal enactments regulating nongovernmental activity. See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 340-41 (1816); *Federal Energy Regulatory Comm'n v. Mississippi*, *supra*, 456 U.S. at 766-67. In this case, however, the claimed power

of the federal government to "enlist a branch of state government to further federal ends" relates directly to a critical state function—the state tax system. The general notion of the implicit dominance of federal law, appropriately relied on in *Testa*, cannot be blindly transferred to an area of such vital state concern.

As this Court's decision in *Federal Energy Regulatory Comm'n v. Mississippi* illustrates, careful scrutiny must be given to any federal statute that purports to force an arm of the state to implement federal policy in an area of traditional state concern (in that case, public utility regulation). The Court upheld the federal law at issue in *Mississippi* against a challenge that it violated the Tenth Amendment, U.S. Const., Amend X, but it did so only after emphasizing that the states were free to avoid the federal intrusion by declining to regulate public utilities, 456 U.S. at 769, and that the federal government had taken steps to reduce the financial burden on the states that would be caused by their implementation of federal policy. *Id.* at 751-51 n.14; 770 n.33. Neither ameliorating aspect is present here. It cannot be realistically contended that the states may abandon their tax systems and still function as states; nor has the federal government made any effort to reduce the financial burden associated with attorneys' fees. But the critical distinction between *Mississippi* and this case is that in *Mississippi* there was a very specific statute at issue that left no doubt concerning Congress's intention. That is not the case for §§ 1983 and 1988. There is no evidence of any Congressional intent to disrupt state remedies with respect to state tax systems.

Thus, even if §§ 1983 and 1988 were considered in isolation, there would be no basis for requiring the state to entertain a § 1983 action in the circumstances presented. The federal interest in such a requirement is minimal, as evidenced by the discretionary nature of the remedy and the total lack of explicit federal attention

² U.S. Constitution, Article VI, § 2.

on the subject matter, while the corresponding state interest is high.

But §§ 1983 and 1988 need not be considered in isolation, for Congress has, through the Tax Injunction Act, provided more precise evidence of congressional intent and that evidence unmistakably supports South Carolina's action in declining jurisdiction under § 1983.

B. The Tax Injunction Act Evidences Congress's Intent To Allow State Remedial Provisions To Supplant § 1983 in Actions Relating to State Taxes

The Supreme Court, in its recent decisions, has underscored the importance that specific remedial provisions play in determining the reach of § 1983 and has consistently rejected the attempts of litigants to circumvent specific statutes through the mechanism of pleading a Section 1983 cause of action. In *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court held that the remedial limitations of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act could not be "bypassed by bringing suit directly under § 1983." *Id.* at 20 (citation omitted). The Court concluded that the specific provisions in those Acts were intended by Congress "to supplant any remedy that otherwise would be available under § 1983." *Id.* at 21. Just last term, the Court held, following the reasoning of the *Sea Clammers* decision, that the specific remedial provisions of the Education of the Handicapped Act supplanted the general remedial provisions of § 1983. *Smith v. Robinson*, 104 S. Ct. 3457 (1984). The Court noted, in particular, that the Education of the Handicapped Act sought "to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child," *id.* at 3469, and that allowing a supplementary § 1983 remedy would be inconsistent with that intent. Directly at issue in *Smith v. Robinson* was whether the litigant was entitled

to attorneys' fees under § 1988, despite the fact that the Education of the Handicapped Act did not provide for attorneys' fees. The Court held that the omission of attorney's fees from the Act could not be avoided by resorting to §§ 1983 and 1988.

The principles enunciated in *Sea Clammers* and *Smith v. Robinson* apply with equal force in this case. The Tax Injunction Act evidences a congressional intent to establish an alternative remedial structure for litigants in state tax cases. The Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a state to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) (emphasis added). In specific terms, the Act provides that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

Petitioners dismiss the Tax Injunction Act as merely jurisdictional, arguing that "Section 1341 and comity do no provide state courts an exemption from federal causes of action. They limit only the power of federal courts." Petitioners' Brief at 67. But that argument misses the point. By the same logic, the Reconstruction Civil Rights Acts were "jurisdictional" statutes since Congress's primary purpose was to provide a federal forum for the resolution of federal constitutional rights. The critical issue is not one of statutory labels, but one of congressional intent. The issue before the Court is what mechanism Congress intended for the vindication of federal constitutional rights in challenges to state tax systems. Petitioners claim that those rights must be vindicated in accordance with the provisions of §§ 1983 and 1988. The Tax Injunction Act stands for the proposition that those rights may be vindicated by state remedies, provided that the remedies are "plain, speedy and efficient." In the clash between these two policies, the poli-

cies underlying the Act must prevail, since the Tax Injunction Act is a more specific indication of congressional intent.

It is clear that, whether or not South Carolina exercises jurisdiction under § 1983, it must address and remedy petitioners' valid federal constitutional claims. *California v. Grace Brethren Church*, 457 U.S. 393, 414 (1982); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 514 (1981). The State is thus not seeking an "exemption" from federal law, as petitioners claim. Rather, the State is asserting the right to fashion its own remedies, within the contours of the Tax Injunction Act, for the federal constitutional violation it found. The right of a state to fashion its own remedy with respect to federal constitutional challenges to its system of taxation lies at the core of the Tax Injunction Act.

One of the central concerns that led to passage of the Act was the difference in *remedies* available under federal and state law, in particular, injunctive remedies. As the Senate Report accompanying the legislation stated:

"It is common practice for statutes of the various states to forbid actions in state courts to enjoin the collection of state and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of state legislation makes it possible for the states and their various agencies to survive while long-drawn-out tax litigation is in progress. If those to whom the Federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the state being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation."

S. Rep. No. 1035, 75th Cong., 1st Sess., pp. 1-2 (1937).

The jurisdictional limitation of the Act thus had its genesis in Congress's concern that federally-imposed remedies would "disrupt state and county finances." 81 Cong. Rec. 1916 (1937) (Remarks of Sen. Bone). Congress's resolution of the problem was to place "the burden on the taxpayer to follow the required state procedure. . . ." *Alger v. Peck*, 347 U.S. 984, 985 (1954). The Tax Injunction Act "creates alternative rather than supplemental remedies. . . . Congress intended to remit a plaintiff completely to his state court remedies so long as they are plain, speedy and efficient." *Redd v. Lambert*, 674 F.2d 1032, 1036 (5th Cir. 1982).

This Court has recognized the broad significance of the policies underlying the Tax Injunction Act and has given effect to those policies in circumstances outside of the literal jurisdictional preclusion contained in the statute. Drawing on the importance of the principles of federalism embodied in the Act, the Court has held that federal courts may not grant declaratory relief against the constitutionality of state taxing statutes. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *California v. Grace Brethren Church*, 457 U.S. 393 (1982). The Court has also held that a federal court may not entertain a § 1983 action for damages in a case involving the constitutionality of a state's tax system. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). The Court in *McNary* noted that "the intrusiveness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pope*. . . . Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety." *Id.* at 114.

Although the Court in *McNary* and *Grace Brethren Church* was confronted with issues relating to the role of federal courts, a requirement that states entertain § 1983 actions in state tax cases would threaten exactly the

same type of harm that Congress sought to avoid through the Tax Injunction Act. For instance, as was noted in *McNary*, the nonexhaustion principle that this Court has adhered to in § 1983 actions would disrupt state tax administration. A plaintiff could argue that the same principle of nonexhaustion applies to § 1983 actions brought in state court. Similarly, one of the fundamental purposes of the Tax Injunction Act was to preserve state remedial provisions that limit the availability of injunctions in state tax cases. Yet a plaintiff, by asserting a federal right to injunctive relief under § 1983 in state court, could subvert that purpose.

The principles underlying the Tax Injunction Act thus extend beyond jurisdictional issues. Through that Act, Congress chose to place reliance on the alternative remedial schemes available in the states with respect to state tax issues, with the proviso that the states' remedy must be "plain, speedy and efficient." This approach, indicative of Congress's respect for state sovereignty in an area vital to the state's existence, is entitled to as much weight as the detailed federal remedial schemes at issue in *Sea Clammers* and *Smith v. Robinson*, *supra*. At a minimum, some specific indication of Congressional intent should be required before the remedial structure implicit in the Tax Injunction Act is abandoned.³ As discussed previously, however, there is no such evidence of Congressional intent in either the language or legislative history of §§ 1983 and 1988.

It bears re-emphasizing that the state's "plain, speedy and efficient remedy" must provide for a full hearing and judicial determination of *all federal constitutional objections* to the state tax in order to meet the requirements of the Supremacy Clause as well as the standard

³ *Amici's* argument in this case is based on the absence of any showing of a racially discriminatory animus underlying the state tax provision at issue. A stronger federal interest may be present where a racially discriminatory animus is found.

established by Congress in the Tax Injunction Act. The State of South Carolina met that requirement in this case. The state court reviewed petitioners' constitutional objections to the state tax; ruled in petitioners' favor on the constitutional issues; granted the petitioners a tax refund; and rendered the state statute null and void. There is thus no doubt that the essential federal right involved in this case has been vindicated through the remedies provided by state.

Petitioners argue, however, that their federal *statutory* rights have not been vindicated. But that argument evades the central issue in the case. The federal statutory right asserted is one that provides a cause of action for raising the very same federal constitutional rights that South Carolina addressed and resolved in petitioners' favor. Petitioners' complaint is that the State failed to consider an award of attorneys' fees under § 1988. But that complaint simply brings the issue back full circle—has the federal government demanded a particular federal remedy, award of attorneys' fees, for vindication of federal constitutional challenges to state tax systems? The answer is no. The clearest indication of Congressional intent with respect to remedies for the vindication of federal constitutional challenges to state tax systems is that contained in the Tax Injunction Act, which specifies that state remedies meeting the "plain, speedy and efficient" standard are sufficient.

In this case, the court's failure to consider awarding attorneys' fees, did not vitiate the adequacy or efficiency of the state's remedy. *Cf. Rosewell v. LaSalle Natl. Bank*, *supra* (sustaining a state remedy as "plain, speedy, and efficient" under the Tax Injunction Act despite the state's failure to provide for interest in tax refund litigation). Indeed, in view of the longstanding "American rule" on attorneys' fees—which does not contemplate the award of attorneys' fees as a general matter, *see Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)—

the meaning of a "plain, speedy and efficient remedy" would have to be wrenched entirely out of context to support a claim that the lack of attorneys' fees is objectionable. There is simply nothing to suggest that in enacting the attorneys' fee provision of § 1988 Congress intended, *sub silentio*, to modify the substantive content of this long-established standard. Yet, to hold that state courts must entertain § 1983 actions challenging state taxes would work this very effect.

A mandatory requirement for considering the provision of attorneys' fees is also difficult to square with the historical background of the Tax Injunction Act. One of the motivations behind the Tax Injunction Act was to prevent large out-of-state corporations from disrupting state finances through litigation. See S. Rep. No. 1035, 75th Cong., 1st Sess., pp. 1-2. It is unlikely, therefore, that Congress would have imposed the liability for the attorneys' fees of such corporate tax litigants upon the state without addressing the issue in any fashion.

In short, the issue before the Court in this case is not the Supremacy Clause, but two competing federal policies: The general remedial policy enacted by Congress in § 1983 and in particular, the general, discretionary remedy provided by § 1988; and the specific policy adopted by Congress in Tax Injunction Act, which was designed to respect state sovereignty in the fashioning of remedies in state tax cases. The Court has previously addressed a comparable conflict between § 1983 and the policies underlying the Tax Injunction Act and concluded that the latter must prevail. *Fair Assessment in Real Estate Ass'n v. McNary*, *supra*.

Petitioners point to the *McNary* decision as underscoring the importance of requiring states to entertain § 1983 actions in state tax cases, since that decision removed their option of litigating in federal court. Petitioners' Brief at 46-50. In fact, *McNary* underscores the

inappropriateness of requiring states to entertain § 1983 in state tax cases. The primary purpose of § 1983 was to provide a federal forum for the vindication of federal rights. The question that *McNary* highlights is why Congress would have intended to *require* state courts to exercise jurisdiction over § 1983 claims that no federal court itself could entertain. If the federal interests in state remedies for constitutional challenges to state tax systems were significant, logic and the historical background of § 1983 would suggest that a federal forum would be available to litigants, since making a federal forum available is less intrusive on state sovereignty than mandating state courts to bear the entire burden of implementing federal policy. See Hart, *The Relations Between State and Federal Law*, *supra*, 54 Colum. L. Rev. at 508. However, as the *McNary* decision illustrates and the Tax Injunction Act confirms, the federal interest in prescribing a remedial structure for state taxation systems is minimal and is entirely consistent with allowing the state to fashion its own efficient and adequate remedies for resolving infirmities in its tax system.

CONCLUSION

The extent to which the federal government may, within the bounds of the Constitution, superimpose federal remedies on a state tax system is uncertain. What is certain is that Congress and the federal courts have been extremely circumspect in that area, proving again "the great fact of political science that ultimate questions often do not have to be faced in successful collaborative living." Hart, *The Relations Between State and Federal Law*, *supra*, 54 Column. L. Rev. at 507-08. In this case, it is clear that the discretionary federal remedy of attorneys' fees, contained in a general remedial statute, adopted without specific reference to the administration of state taxes, cannot outweigh the direct evidence of

Congressional intent contained in the Tax Injunction Act and the central principles of federalism "which should at all times actuate the federal courts." *Matthews v. Rodgers*, 284 U.S. 521, 526-27 (1932).

The decision of the South Carolina Supreme Court should be upheld.

Respectfully submitted,

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No. 84-249

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

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Petitioners,

v.

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Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF OF AMICI CURIAE
In Support of Respondents

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BRIEF OF AMICI CURIAE
In Support of Respondents

INTEREST OF AMICI CURIAE

The primary interest of the amici
states^{1/} in this case is one that

^{1/} The states participating in this
brief as amici curiae are: Alaska, Ar-
kansas, Colorado, Idaho, Iowa, Kentucky,
Maryland, Massachusetts, Minnesota, Ne-
vada, North Dakota, New Hampshire, Ohio,
Pennsylvania, and South Dakota.

has long been recognized by this Court as fundamental--"the imperative need of a State to administer its own fiscal operations. . . . 'especially when the state . . . has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally collected tax.'"^{2/} The "compelling nature" of this interest, Rosewell v. LaSalle National Bank, 450 U.S. 503, 527 (1981), is based on both practical and theoretical considerations. States are, of course, dependent on the efficient and expeditious collection of taxes for their day-to-day operation.^{3/} Even more

^{2/} Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976) (quoting from Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943)).

^{3/} States derive most of their revenue from state taxes. Advisory Comm'n on (footnote continued)

fundamentally, the states' ability to administer their systems of tax collection, free from undue federal interference, is essential to their sovereign status within our federal system. Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100, 102 (1981).

To require state courts to provide relief under 42 U.S.C. § 1983 for claims based upon allegedly unconstitutional state taxes "would disrupt the process of local taxation and create burdensome and unnecessary chaos in local government." Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370, 375 (1976). In addition to the potential for damages and attorney's fees that "would place 'enormous

(footnote continued)

Intergovernmental Relations, Significant Features of Fiscal Federalism 53, 56 (1980), cited in Rosewell, 450 U.S. at 527.

fiscal burdens on the States," cf. Quern v. Jordan, 440 U.S. 332, 345 n. 16 (1979), "the very maintenance of the [\$ 1983] suit itself would intrude on the enforcement of the state [tax] scheme," Fair Assessment, 454 U.S. at 114, by permitting aggrieved taxpayers to evade the mechanisms established by state legislatures for resolving tax disputes.

A second interest shared by the amici states is in the independence and integrity of their state judiciaries. While in no way questioning the obligation of state courts to uphold and enforce federal law, as the South Carolina Supreme Court did here, the amici ask the Court to recognize their prerogative, under our federal system, to determine how those rights are to be enforced. In so doing, the Court is urged to consider

the enormous and unnecessary burden that would be imposed on state courts^{4/} by requiring them to adjudicate § 1983 claims in tax cases where state law already provides an adequate, but less burdensome, remedy for violations of federal law.^{5/} As noted by one commentator, the problem should be viewed

as one of accommodation between the somewhat conflicting constitutional purposes of securing the effective enforcement of federally created rights in the manner which

4/ Affirming the lower court's judgment in this case would not increase the burden on federal courts, since, as recognized by petitioners, Petitioners' Brief at 46-47, this type of case could not be brought in federal court.

5/ Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 507-08 (1944); Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 S. Ct. Rev. 187, 207 n. 187.

to Congress seems proper and, at the same time, maintaining the states as viable political units with the ability to direct the ends for which their judicial systems may be used.

Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551, 1555 (1960).

Accordingly, the amici urge this Court, in resolving the important questions presented by this case, to adhere to the principles of "Our Federalism," under which

there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971). As in Fair Assessment, 454 U.S.

at 102, "[t]his Court [should continue to] . . . recognize[] the important and sensitive nature of state tax systems and the necessity for . . . restraint when deciding cases that affect such systems." As will be shown below, adherence to those principles requires that the decision of the South Carolina Supreme Court be affirmed.^{6/}

SUMMARY OF ARGUMENT

The threshold question presented by this case is whether it is an action to enforce the provisions of 42 U.S.C. § 1983, giving rise to eligibility for attorney's fees under 42 U.S.C. § 1988. The legislative history of § 1983 and of 28 U.S.C. § 1341 demonstrates that

^{6/} In contrast to the larger interests shared by the amici and the respondents, the sole interest of the petitioners in this case is in having their attorney's fees paid by the state.

Congress did not intend § 1983 to be used as a remedy for unconstitutional taxation where, as here, state law provides an adequate remedy for such constitutional claims. Nor was § 1983 intended to be used to enforce the Privileges and Immunities Clause or to apply to actions against a state. Since this case therefore cannot be characterized as an action to enforce the provisions of § 1983, no attorney's fees were available under § 1988. Pp. 10-33.

Even if this tax case were cognizable under § 1983, the South Carolina court was not required to adjudicate petitioners' § 1983 claim. Although the Supremacy Clause requires state courts to enforce substantive federal law, it does not require that they use § 1983 to do so where state law provides an adequate remedy for federal constitutional

claims. Congress did not intend to require state courts to entertain § 1983 claims in tax cases against the state; and, even if Congress did so intend, the South Carolina court had several "valid excuses" for declining to do so, including the state's sovereign immunity, its sovereign status under the Tenth Amendment, and the fact that even the federal courts would not have been required, or permitted, to adjudicate petitioners' § 1983 claim. Pp. 33-57.

Finally, even if the South Carolina court was required to entertain petitioners' § 1983 claim, it acted within the scope of its discretion in declining to award attorney's fees under 42 U.S.C. § 1988. Congress expressly intended to give trial courts the discretion to deny

fees in appropriate circumstances. Denial of fees was particularly appropriate here since petitioners' § 1983 claim was entirely superfluous to their success in obtaining a tax refund and since their interests in this matter were more in the nature of property than personal rights. Pp. 57-63.

ARGUMENT

I. AN ACTION SEEKING A REFUND OF STATE TAXES ON THE GROUND THAT THE APPLICABLE STATE STATUTE VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE IS NOT AN ACTION TO ENFORCE THE PROVISIONS OF 42 U.S.C. § 1983, GIVING RISE TO ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, applies only to actions or proceedings to enforce the provisions of 42 U.S.C. § 1983 (and other specified statutes not at issue here). Where § 1983 does not

afford a remedy, attorney's fees are not available under § 1988. See, e.g., Smith v. Robinson, 104 S. Ct. 3457, 3468-74 (1984). Therefore, although the ultimate question raised by this case is whether the South Carolina Supreme Court properly declined to award fees under § 1988, the threshold question is whether this action was cognizable under § 1983.^{7/}

In recent cases defining the scope of § 1983, this Court has clarified that § 1983 does not always provide a remedy for the deprivation of all federal rights.^{8/} Rather, in determining

^{7/} As discussed in section III, infra, even if this action could be viewed as one to enforce the provisions of § 1983, the court nevertheless was justified in declining to award fees on other grounds.

^{8/} See Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); Smith v. Robinson, 104 S. Ct. at 3468-74.

whether § 1983 applies, "[t]he crucial consideration is what Congress intended." Smith v. Robinson, 104 S. Ct. at 3469-70. As will be shown here, Congress did not intend § 1983 to be used as a remedy in this type of case. Section 1983 was not intended to apply to cases seeking refunds of state taxes where an available state law remedy is adequate to redress any violations of federal constitutional rights. Nor was § 1983 intended to provide a remedy for violations of the Privileges and Immunities Clause or to apply to any actions against a state.

A. Congress Did Not Intend § 1983 to Be Used as a Remedy for Unconstitutional Taxation Where State Law Provides an Adequate Remedy for Such Constitutional Claims.

One exception to the otherwise broad reach of § 1983 that has been repeatedly

recognized by this Court is that § 1983 does not apply where the remedial devices provided in another federal statute are sufficiently comprehensive to demonstrate congressional intent to preclude suits under § 1983. Pennhurst, 451 U.S. at 28; Sea Clammers, 453 U.S. at 13-21; Smith v. Robinson, 104 S. Ct. at 3468-74. Where such congressional intent is found to exist, this exception applies regardless of whether the federal right that the plaintiff seeks to enforce is statutory, Pennhurst; Sea Clammers, or constitutional. Smith v. Robinson. Similarly, actions seeking tax refunds under § 1983 are precluded because of the congressional intent that adequate state-law remedies be the exclusive means for resolving state tax disputes.

Examination of the legislative history of § 1983 reveals that it was originally intended to provide "a uniquely federal remedy," Mitchum v. Foster, 407 U.S. 225, 239 (1972), for civil rights violations where state remedies were either inadequate or unavailable. Monroe v. Pape, 365 U.S. 167, 174-80 (1961). Indeed, this legislation, which was originally enacted as one of the Ku Klux Klan Acts following the Civil War, was premised on the assumption by Congress that state remedies for enforcing federal law were inadequate. Haring v. Prosise, 462 U.S. 306 (1983).

However, in a more recent and specific enactment, 28 U.S.C. § 1341,^{9/}

^{9/} That statute provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection

(footnote continued)

Congress expressly indicated that no federal court remedy is necessary (or even permissible) in cases challenging state taxes where an adequate remedy is available in state court. Fair Assessment, 454 U.S. at 116. Even where taxpayers raise constitutional objections to a state tax, § 1341 and its underlying principles of comity require that "[s]uch taxpayers must seek protection of their federal rights by state remedies," rather than by § 1983.^{10/}

Although § 1341 directly precludes only federal court jurisdiction, the

(footnote continued)

of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

^{10/} Id.; see also, e.g., Werch v. City of Berlin, 673 F.2d 192, 194 (7th Cir. 1982); Bland v. McHann, 463 F.2d 21 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973).

concerns underlying its enactment argue just as forcefully against permitting the use of federal remedies in state court in state tax cases. As this Court has previously noted, the enactment of § 1341 "was motivated in large part by comity concerns." Fair Assessment, 454 U.S. at 110. "[T]he statute has its roots in . . . principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." Tully v. Griffin, 429 U.S. at 74. In particular, Congress was concerned that, by invoking federal remedies, "'taxpayers might escape the procedural requirements imposed by state law'" and thereby disrupt local financing. Rosewell, 450 U.S. at 527; S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937).

These concerns are equally applicable to state court proceedings contesting state taxes. As recognized by the Georgia Supreme Court, in refusing to permit a taxpayer to circumvent state administrative and judicial remedies by seeking relief under § 1983, "§ 1341 . . . manifests a federal policy of deference to state administrative and judicial remedies in matters of state taxation that bars a claim for a tax refund under § 1983."^{11/} Indeed, if taxpayers in state court proceedings were permitted to by-pass state procedural requirements merely by invoking § 1983, Congress' intent in enacting § 1341--that state

^{11/} Backus v. Chilivis, 224 S.E.2d at 374; see also State Tax Comm'n v. Fondren, 387 So.2d 712, 723 (Miss. 1980), cert. denied sub nom. Redd v. Lambert, 450 U.S. 926 (1981).

remedies be used to contest state taxes--would be totally frustrated.

Thus, in enacting § 1341, Congress created an exception to the assumption of inadequate state remedies underlying § 1983. Those two statutes, construed together,^{12/} evince the congressional intent that while a federal remedy generally should be available to enforce federal law, no federal remedy is permissible in cases challenging state taxes where a "plain, speedy and efficient remedy" is available under state law. The purpose of § 1983--to afford a federal remedy where "state courts were un-

^{12/} See Kokoszka v. Belford, 417 U.S. 642, 651 (1974) (when interpreting a statute Court looks not merely to statute in question but also to other statutes in order to effectuate legislative intent); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 194 (1967) (later act may limit reach of earlier act's vague language).

able or unwilling to protect federal rights," Haring v. Prosise, 462 U.S. at 306--is not served by providing a federal remedy where state courts are willing and able to protect federal rights. And the purpose of § 1341--to prevent unnecessary disruption of state tax proceedings--is also ill-served by permitting taxpayers to seek federal remedies in such proceedings.

Given this congressional intent that an adequate state remedy, such as the one employed here,^{13/} be the exclusive remedy for challenging the validity of a state tax, it follows, under the same

^{13/} Petitioners do not challenge the adequacy of the state court remedy for vindicating federal constitutional rights in tax cases, nor could they, since the adequacy of that remedy is evident from the results of this case--a state tax statute was struck down by a state court on federal constitutional grounds.

rationale applied by this Court in Pennhurst, Sea Clammers, and Smith v. Robinson, that actions challenging the validity of a state tax do not fall within the ambit of § 1983 as properly construed. As in Sea Clammers, the existence of other remedies, to which Congress expressly deferred, demonstrates that Congress "intended to supplant any remedy that otherwise would be available under § 1983." Id. at 21. Therefore, §§ 1983 and 1988 should not be construed to apply to cases such as this.

B. Congress Did Not Intend § 1983 to Be Used to Enforce the Privileges and Immunities Clause.

A second exception to the coverage of § 1983 that has been recognized by this Court is that not all federal statutes or constitutional provisions create "rights secured" by federal law, within the meaning of § 1983. Pennhurst, 451

U.S. at 28. Again, the crucial question is one of congressional intent. Id. at 15.

Historically, § 1983 was intended by Congress to enforce the provisions of the Fourteenth Amendment to the United States Constitution. Monroe v. Pape, 365 U.S. at 171; Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 611 (1979). Accordingly, the Fourteenth Amendment is the "centerpiece" of the statute, Mitchum v. Foster, 407 U.S. at 238-39; and the constitutional rights enforceable under § 1983 are those rights guaranteed by the Fourteenth Amendment.^{14/}

^{14/} Developments in the Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1135, 1169 (1977); cf. Carter v. Greenhow, 114 U.S. 317 (1885) (violation of Contract Clause not actionable under

(footnote continued)

Those rights do not include those protected by the Privileges and Immunities Clause of Article IV. Despite the similar wording of that clause and the Fourteenth Amendment itself (which also refers to "privileges or immunities"), these two clauses have widely differing and mutually exclusive applications. J. Nowak, R. Rotunda, J. Young, Constitutional Law 414 (2d ed. 1983); L. Tribe, American Constitutional Law §§ 7-2, 7-4 (1978). Ever since the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), it has been well-established that the privileges or immunities pro-

(footnote continued)

predecessor of § 1983); Chapman v. Houston Welfare Rights Org., 441 U.S. at 615 (violation of Supremacy Clause not actionable under § 1983); Consol. Freightways Corp. v. Kassel, 730 F.2d 1139, 1145 (8th Cir.), cert. denied, 105 S. Ct. 126 (1984) (violation of Commerce Clause not actionable under § 1983).

tected by the Fourteenth Amendment are only those rights peculiar to being a citizen of the United States, such as the right to vote in a federal election. Id. at 74, 79. The privileges and immunities protected by Article IV, on the other hand, comprehend all the privileges and immunities of state citizenship, such as the right to acquire and possess property, which are not protected by the Fourteenth Amendment. Id. at 74, 77. As noted by one scholar, "the Slaughterhouse holding . . . removed from the purview of the [Privileges or Immunities] clause [of the Fourteenth Amendment] every civil right traditionally associated with state protection." L. Tribe, American Constitutional Law § 7-4.

It is also pertinent to note that the Privileges and Immunities Clause of Article IV, like the Commerce Clause of

Article I, historically was designed to protect the privileges of trade and commerce and to assure national uniformity in such matters.^{15/} As previously explained by this Court, the similarity between the Commerce Clause and the Privileges and Immunities Clause of Article IV "stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." Hicklin v. Orbeck, 437 U.S. at 531-32. Since the Privileges and Immunities Clause was intended primarily to protect the national interest in an efficient economy, rather than the individual rights of citizens who might

^{15/} Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978); United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 104 S. Ct. 1020, 1026, 1028 (1984); L. Tribe, American Constitutional Law 36 (Supp. 1979); Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425 (1982).

benefit indirectly from this protection, it should not be construed as creating rights "secured" by the Constitution, within the meaning of § 1983. See Consolidated Freightways Corp. v. Kassel, 730 F.2d at 1144-45. Accordingly, violations of the Privileges and Immunities Clause are not actionable under § 1983.

An additional reason that the rights at stake here are not enforceable under § 1983 is that the right not to be subjected to an illegal tax is not the type of right protected by the Fourteenth Amendment. Although this Court has, in general, rejected the distinction between personal and property rights for purposes of Fourteenth Amendment analysis, Lynch v. Household Finance Corp., 405 U.S. 538, 543 (1972), it has expressly preserved that distinction with respect to cases

involving constitutional challenges to state taxation, "a subject governed by unique considerations." Id. at 543 n. 6.^{16/} Thus in tax cases, where property rights rather than personal rights are at stake, § 1983 was not intended to apply.^{17/}

^{16/} Although the Lynch case was construing 28 U.S.C. § 1343 rather than 42 U.S.C. § 1983, its holding and analysis are equally applicable to § 1983, since the Court expressly noted that "[d]espite the different wording of [§ 1983] and [§ 1343], when the § 1983 claim alleges constitutional violations . . . both sections are construed identically" (emphasis added). Id. at 544 n. 7. Cf. Maine v. Thiboutot, 448 U.S. 1 (1980) (construing § 1983 more broadly than § 1343 where the § 1983 claim alleges statutory violations).

^{17/} See Hornbeak v. Hamm, 283 F. Supp. 549 (M.D. Ala.), aff'd, 393 U.S. 9 (1968); Backus v. Chilivis, 224 S.E.2d at 374; Consol. Freightways Corp. v. Kassel, 730 F.2d at 1146; see also Boland v. City of Rapid City, 315 N.W.2d 496 (S.D. 1982) (inverse condemnation claim

(footnote continued)

C. Congress Did Not Intend § 1983 to Apply to Actions Against a State.

Section § 1983, by its express terms, applies only to a "person" who subjects someone to the deprivation of rights secured by federal law. Although this Court has never expressly stated that a state is not a "person" for purposes of liability under § 1983, its holding in Quern v. Jordan, strongly intimates that conclusion, 440 U.S. at 365 (Brennan, J., concurring) ("the Court resolutely opines that a State is not a 'person' for purposes of § 1983"), which has also

(footnote continued)

not actionable under § 1983); First Nat'l Bank v. Marquette Nat'l Bank, 636 F.2d 195 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981) (violation of federal statute protecting property rather than personal rights not actionable under § 1983).

been drawn by most state courts that have considered the question.^{18/}

The conclusion that § 1983 does not apply to suits against states is consistent with the congressional intent underlying that statute, as explicated by this Court. In Quern v. Jordan, 440 U.S. at 341, the Court was "simply . . . unwilling to believe . . . that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States." The

^{18/} See, e.g., Edgar v. State, 92 Wash. 2d 217, 595 P.2d 534 (1979), cert. denied, 444 U.S. 1077 (1980); Boldt v. State, 101 Wis.2d 566, 305 N.W.2d 133, 143, cert. denied, 454 U.S. 973 (1981); State v. Green, 633 P.2d 1381 (Alaska 1981); De Bleecker v. Montgomery County, 292 Md. 498, 438 A.2d 1348 (1982); Woodbridge v. Worcester State Hosp., 384 Mass. 38, 45 n. 7, 423 N.E.2d 782 (1981).

This question generally does not arise in federal court, where suits against states are barred, in any event, by the Eleventh Amendment. Quern v. Jordan, 440 U.S. at 338-45.

Court's refusal to infer any intent to override the states' sovereign immunity was based on a careful examination of circumstances surrounding the adoption of the Fourteenth Amendment and from the legislative history of § 1983 itself. Id. at 343-44.

Although the immunity directly at issue in Quern was the immunity from suit in federal court guaranteed to the states by the Eleventh Amendment, the logic and historical analysis underlying the Court's holding is equally applicable to the states' sovereign immunity from suit in their own courts, surely one of the most "traditional" dimensions of state sovereign immunity. See also Thiboutot v. State, 405 A.2d 230, 236-37 (Me. 1979), aff'd sub nom. Maine v. Thiboutot, 448 U.S. 1 (1980). The immunity of states from suit in their own courts has

long been recognized by this Court as one of the attributes of state sovereignty inherent in our federal system.^{19/} That immunity derives not from the Eleventh Amendment or any other particular constitutional provision, but from the general understandings underlying and predating the Constitution.^{20/}

Nor did the framers intend to abrogate the states' sovereign immunity in adopting the Constitution.^{21/} To the

19/ See, e.g., Palmer v. Ohio, 248 U.S. 32, 34 (1918); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642 (1911); Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 451 (1883).

20/ Monaco v. Miss., 292 U.S. 313, 322-23 (1934); Ex parte N.Y., 256 U.S. 490, 497 (1921).

21/ Hans v. La., 134 U.S. 1, 13-18 (1890); see also Liberman, State Sovereign Immunity in Suits to Enforce Federal Rights, 1977 Wash. U.L.Q. 195, 202.

contrary, in the debates preceding ratification, John Marshall flatly stated: "It is not rational to suppose that the sovereign power [of a state] should be dragged before a court."^{22/} Alexander Hamilton expressed similar sentiments in The Federalist No. 81, quoted in Edelman v. Jordan, 415 U.S. 651, 661 n. 9 (1974).

The vague language of § 1983 certainly does not constitute a statement of sufficient clarity to overcome the states' traditional sovereign immunity from suit, particularly in the sensitive

22/ 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 555-56 (J. Elliot ed. 1836), quoted in Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 528-29 (1977).

area of state taxation.^{23/} As recognized in Hutto v. Finney, 437 U.S. 678, 697 n. 27 (1978), such a clear statement of congressional intent to abrogate the states' immunity is required in order to "insure . . . that Congress has not imposed 'enormous fiscal burdens on the States' without careful thought."

There can be no doubt that an action seeking a refund of allegedly unconstitutional state taxes is an action against the state itself, regardless of the identity of the named defendants. Ford

^{23/} Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 465 (1945); Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973) (clear statement of congressional intent required to abrogate states' immunity from suit, not found in § 1983); Quern v. Jordan, 440 U.S. at 345 n. 16; Sandalow, supra at 207.

Motor Co. v. Department of Treasury, 323 U.S. at 464; Hopkins v. Clemson Agricultural College, 221 U.S. at 642. Since § 1983 was not intended to encompass actions against states, this action does not fall within the intended scope of § 1983; and since this case was therefore not an action to enforce the provisions of § 1983, no attorney's fees were available under § 1988. Smith v. Robinson, 104 S. Ct. at 3471.^{24/}

II. THE SOUTH CAROLINA COURT WAS NOT REQUIRED TO ADJUDICATE PETITIONERS' § 1983 CLAIM.

Assuming, contrary to the arguments made in the preceding section, that pe-

^{24/} Since for the reasons discussed above, § 1983 could not be used as a remedy for petitioners' constitutional claim, the substantiality of that claim is immaterial. See Smith v. Robinson, 104 S. Ct. at 3469 ("Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim" (emphasis added) to a free appropriate public education).

petitioners stated a claim cognizable under § 1983, the South Carolina court had no constitutional obligation to adjudicate that claim.

A. The South Carolina Court Did Not Decline to Enforce the Federal Constitution.

Before discussing to what extent state courts are obligated to enforce federal law, it must be emphasized that the state court in this case did not decline to enforce substantive federal rights. To the contrary, the state court relied solely on petitioners' federal constitutional claim in ruling in their favor. That it did so pursuant to a state statutory remedy providing for a refund of state taxes "wrongfully or illegally collected for any reason going to the merits," S.C. Code Ann. § 12-47-220, rather than pursuant to the

remedy afforded by § 1983, is of no constitutional consequence.

It is well-settled that § 1983 itself provides no substantive federal rights. As stated by this Court,

No matter how broad the [§1983] cause of action may be, the breadth of its coverage does not alter its procedural character. . . . [I]t remains true that one cannot go into court and claim a "violation of § 1983"--for § 1983 by itself does not protect anyone against anything.

Chapman v. Houston Welfare Rights Organization, 441 U.S. at 617. Since § 1983 creates no rights, petitioners cannot successfully contend that by declining to address their § 1983 claim, the state court violated its obligation under the Supremacy Clause to enforce their "rights" under § 1983. See Petitioners' Brief at 20-31.

The only substantive federal rights involved in this case are the petitioners' constitutional rights under the Privileges and Immunities Clause.^{25/} With respect to those rights, the state court certainly cannot be charged with having violated its obligations under the Supremacy Clause, since it refused to enforce a state law that it found to be inconsistent with the federal constitution--precisely what the Supremacy Clause requires. As recognized by Justice Frankfurter, concurring in the judgment in Brown v. Gerdes, 321 U.S. 178, 193 (1944):

The federal law in any field
within which Congress is

^{25/} Compare Testa v. Katt, 330 U.S. 386 (1947), FERC v. Miss., 456 U.S. 742 (1982), and other cases relied upon at Petitioners' Brief at 20-31, in which substantive federal statutory rights were involved.

empowered to legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, but not in the sense that it may supplant the existing rules of litigation in the state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States.^{26/}

To admit that state courts have a duty to protect federal rights does not necessarily lead to the inescapable conclusion that they must do so pursuant to § 1983.

This crucial distinction--between declining to enforce substantive federal rights (which the Supremacy Clause admit-

^{26/} See also Liberman, supra at 195 ("State courts, contrary to a literal reading of the supremacy clause, are not compelled to enforce federal rights except to the extent that they arise in connection with state law claims."); Brown v. Hornbeck, 54 Md. App. 404, 458 A.2d 900, 904 (1983) (state court did not need to rely on § 1983 to adjudicate equal protection claim).

tedly requires) and declining to provide a federal remedy where a constitutionally adequate state remedy exists--is understandably glossed over by the petitioners, since recognition of this distinction undermines the constitutional foundation of their entire argument. Since in this case federal law (the Privileges and Immunities Clause) was accorded the supremacy over state law (S.C. Code Ann. § 12-7-750) required by the Constitution, the state court's judgment raises no Supremacy Clause concerns and therefore should be affirmed without reaching the issues discussed below.

B. Congress Did Not Intend to Require State Courts to Entertain § 1983 Claims in Tax Cases Against the State.

This Court has never held that state courts are required to assume jurisdic-

tion over any kind of § 1983 claims.^{27/} See Martinez v. California, 444 U.S. 277, 283 n. 7 (1980); Maine v. Thiboutot, 448 U.S. at 3 n. 1. Nor are the amici aware of any other court holding that state court jurisdiction over § 1983 claims is required in a tax case against the state.^{28/} Rather, the state

^{27/} Claflin v. Houseman, 93 U.S. 130 (1876), and The Federalist No. 82, relied upon by petitioners, Petitioners' Brief at 22-24, "were concerned with whether state courts may take jurisdiction [over federal claims], not with whether they must do so." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 434 (2d ed. 1973).

Indeed, in Claflin itself the Court recognized, without any adverse comment, that "it is true that State courts have, in certain instances, declined to exercise the jurisdiction conferred upon them."

^{28/} None of the cases cited by petitioners for the proposition that state courts must enforce § 1983 are tax cases.

(footnote continued)

courts, in addition to those of South Carolina, that have considered whether they are required to entertain § 1983 claims in tax cases have held that they are not required to do so.^{29/} Backus v. Chilivis, 224 S.E.2d at 374; State Tax Commission v. Fondren, 387 So.2d at 723. No such requirement should be found to exist here, since neither the plain

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Rather, they are all traditional civil rights cases concerning police misconduct or prisoners' rights. See Petitioners' Brief at 37 n. 9. Most state courts have willingly assumed jurisdiction over § 1983 claims, at least in traditional civil rights cases. See Petitioners' Brief, Appendix B.

^{29/} It is, of course, not necessary to determine whether state courts are generally required to assume jurisdiction over § 1983 claims in order to resolve the narrower question presented by the present state tax case. See Backus v. Chilivis, 224 S.E.2d at 373.

language nor the legislative history of § 1983 indicates that Congress intended to require state courts to adjudicate § 1983 claims in state tax cases. Unlike the federal statutes at issue in the cases relied upon by the petitioners, § 1983 does not even mention concurrent state court jurisdiction, much less expressly require it.^{30/} Thus it cannot be said that § 1983 on its face manifests

^{30/} Cf. Testa v. Katt, 330 U.S. at 387 (Emergency Price Control Act expressly provides that federal district courts shall have jurisdiction "concurrently with State and Territorial courts"); FERC v. Miss., 456 U.S. at 750-51 (PURPA expressly requires state administrative tribunals to enforce rights granted by that statute); Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 56 (1912); McKnett v. St. Louis & San Francisco Ry. Co., 292 U.S. 230 (1934); Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. 377 (1929) (FELA provides that "jurisdiction of federal courts shall be concurrent with that of the courts of several states").

"a congressional determination" that it be enforceable in state court. Cf. FERC v. Mississippi, 456 U.S. at 761.

Absent any express mention of state court jurisdiction in § 1983, no congressional intent to require such jurisdiction in tax cases may be inferred, see Redish & Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311, 348 (1976), particularly in light of the intrusion on the sovereignty of the state judiciary that would follow from such an inference. See Interest of Amici Curiae and section IC, supra. As one scholar concluded, "In the absence of a declaration by Congress that state courts must enforce rights that Congress has created, there appears to be no substantial reason why the Supreme Court should impose such an

obligation."^{31/} Not only does § 1983 lack any clear statement of intent to require state courts to hear claims under that statute in tax cases, but no inference of such intent can be drawn from the legislative history. Section 1983 was not intended to mandate state courts to hear federal claims. Quite the contrary, as discussed in section IA, supra, the statute was premised on the unwillingness or inability of state courts to protect federal rights in the aftermath

^{31/} Sandalow, supra at 207. See also Tribe, Intergovernmental Immunities in Litigation, Taxation & Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 694, n. 68, 695 (1976) ("courts should not abrogate state immunity unless they are sure that Congress has considered the federalism interests compromised by suits against states").

of the Civil War.^{32/} Primarily for that reason, that statute sought to provide a federal-court remedy for violation of federal rights.^{33/} Given this congressional understanding, it would be illogical, at best, to hold that a state court is required to entertain a cause of action that owes its very existence to congressional recognition of the

32/ See Haring v. Prosise, 462 U.S. at 306 (quoting from Allen v. McCurry, 449 U.S. 90, 98-99 (1980)) ("one of the central concerns which motivated the enactment of § 1983 [was] . . . the grave congressional concern that the state courts had been deficient in protecting federal rights").

33/ See id. (quoting Allen v. McCurry, 449 U.S. at 101) ("the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights'"); see also D.C. v. Carter, 409 U.S. 418, 427 (1973); Monroe v. Pape, 365 U.S. at 180; Mitchum v. Foster, 407 U.S. at 239-42; Developments in the Law, Section 1983 & Federalism, supra at 1135.

state courts' reluctance or refusal to do so.

Nor can congressional intent to require state courts to hear § 1983 claims in tax cases be inferred from 28 U.S.C. § 1341. Although, as discussed in section IA, supra, that statute was intended to relegate taxpayers challenging the validity of state taxes to state remedies, there is no indication that Congress intended to require state courts to provide a remedy under § 1983. To the contrary, Congress appears to have assumed, in enacting § 1341, that § 1983 remedies might not be available in state court, since, if that remedy were mandated in state court, there would have been no need to require, as a condition to precluding federal court jurisdiction, that "a plain, speedy and efficient

remedy" be available in the state courts.^{34/}

Furthermore, in enacting § 1341, Congress was well aware that the statute would subject taxpayers to state tax refund schemes like that of South Carolina,^{35/} yet it did not require state courts to provide more comprehensive remedies, such as those provided by § 1983. Rather, all that is required for purposes of § 1341 is a "'full hearing and judicial determination' at which [the taxpayer] may raise any and all constitutional objections to the tax." Rosewell, 450 U.S. at 512. The unavailabil-

34/ See Platt v. Union Pac. R.R. Co., 99 U.S. 48 (1879) (legislature is presumed to have used no unnecessary or superfluous words in statute).

35/ S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937); H.R. Rep. No. 1503, 75th Cong., 1st Sess. 2 (1937); Cal. v. Grace Brethren Church, 457 U.S. 393, 412 n. 28, 416 (1982).

ity of interest on the example, is not sufficient to render a state remedy inadequate, nor is the unavailability of attorney's fees. Redd v. Lambert, 522 F. Supp. 608, 610 (N.D. Miss. 1981), aff'd, 674 F.2d 1032 (5th Cir. 1982).

Requiring state courts to provide a federal remedy where state remedies are adequate would also be directly contrary to the principles of comity and federalism underlying § 1341. See Fair Assessment, 454 U.S. at 103. If those principles or the provisions of § 1341 itself preclude even federal court jurisdiction over § 1983 claims in state tax cases, there is no reason to infer that Congress intended to require state courts, which were historically viewed as less competent to adjudicate federal claims, to provide a federal remedy in such

cases. See State Tax Commission v. Fondren, 387 So. 2d at 723.

In sum, neither the plain language of § 1983 nor the legislative intent underlying that statute or 28 U.S.C. § 1341 permit the inference that Congress intended to require state courts to entertain § 1983 claims in tax cases.

C. The State Court Had Several "Valid Excuses" for Declining to Entertain Petitioners' § 1983 Claim.

As this Court has repeatedly recognized, even where Congress expressly confers concurrent jurisdiction on state courts, state courts may decline to exercise that jurisdiction, without violating the Supremacy Clause, if they have a nondiscriminatory, "valid excuse" for

doing so.^{36/} In general, the "valid excuse" doctrine has been applied "in circumstances where requiring the state courts to hear a federal case would unduly burden state resources without serving an overriding federal interest." Redish & Muench, supra at 344, 354. As will be shown in this section, the South Carolina courts had a number of valid excuses for declining to entertain petitioners' § 1983 claim in this case.

The first legitimate reason for declining to entertain the § 1983 claim in this case is that to do so would violate

^{36/} Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. at 388; Mo. v. Mayfield, 340 U.S. 1, 4 (1950).

the state's sovereign immunity.^{37/}
Unlike in Testa and other cases relied upon by the petitioners, this case, seeking a refund of state taxes, is a private action against the state itself, which is therefore barred by the doctrine of sovereign immunity. See section IC, supra. Although by enacting S.C. Code Ann. § 12-47-220, the state has consented to be sued for tax refunds, that consent must be limited to its express terms, and may not be construed to permit actions under § 1983, in which the conditions and procedural limitations on the

^{37/} The state of South Carolina has not abolished its sovereign immunity by statute or by judicial decision. Copeland v. Housing Auth., 316 S.E.2d 408 (S.C. 1984).

state's waiver of immunity could be ignored.^{38/}

The validity of sovereign immunity as a bar to state-court jurisdiction over federal claims, including those brought under § 1983, has previously been recognized by this and other courts.^{39/} This rationale for declining jurisdiction is particularly valid here because of the burden such jurisdiction would impose

^{38/} See Hans v. La., 134 U.S. at 17 (state "may prescribe the terms and conditions on which it consents to be sued"); see also Ford Motor Co. v. Dep't of Treasury, 323 U.S. at 465-66.

^{39/} See Palmer v. Ohio, 248 U.S. at 34; Ga. R.R. & Banking Co. v. Musgrove, 335 U.S. 900 (1949); Fitzpatrick v. Bitzer, 519 F.2d 559, 571 n. 22 (2d Cir. 1975), aff'd in part, rev'd in part, 427 U.S. 445 (1976); De Bleecker v. Montgomery County, 438 A. 2d at 1356 n. 4; Kristensen v. Strinden, 343 N.W.2d 67, 76 (N.D. 1983); Thiboutot v. State, 405 A.2d at 237; Woodbridge v. Worcester State Hosp., 384 Mass. at 38, 44.

on state courts and because such jurisdiction would not only fail to serve an overriding federal interest, it would also run contrary to the federally recognized interest in state sovereignty, particularly in the sensitive area of state taxation. See Interest of Amici Curiae, supra; see also Redish & Muench, supra at 344, 354. Where, as here, the substantive federal right involved (Article IV privileges and immunities) is adequately protected by a state remedy, declining to afford a federal remedy is not "inimical to the federal substantive policy expressed in the federal cause of action."^{40/} Redish & Muench, supra at 357.

^{40/} As discussed in section IB, supra, § 1983 creates no substantive rights.

Nor does this rationale for declining jurisdiction discriminate against federal claims, since a state's immunity from suit applies equally to state and federal claims. Cf. McKnett v. St. Louis & San Francisco Railway Co., 292 U.S. at 234. As one scholar rhetorically asked, "How can a state be charged with discriminating against a federal claim when it allows no suits in state courts against a sovereign?" Tribe, Intergovernmental Immunities, supra at 692 n. 62.

- A second "valid excuse" for declining jurisdiction here is based on the Tenth Amendment. Although the precise parameters of state sovereignty preserved by that amendment remain unclear,^{41/} the

^{41/} See Garcia v. San Antonio Metropolitan Transit Auth., 104 S. Ct. 3582 (1984) (ordering parties to brief the

(footnote continued)

attributes of state sovereignty involved here--the power to tax, the power to control the jurisdiction of state courts, and the immunity from suit without consent--would be "indisputabl[e] attributes of state sovereignty," Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264, 287-88 (1981), under any test the Court might articulate.^{42/} Since those attributes of sovereignty

(footnote continued)

issue of whether or not the principles of the Tenth Amendment as set forth in Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered),

42/ See, Hamilton, The Federalist No. 81, quoted in Edelman v. Jordan 415 U.S. at 661 n. 9 ("inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent"); Fair Assessment, 454 U.S. at 102 ("important and sensitive nature of state tax systems"); M'Culloch v. Md., 17 U.S. (4 Wheat.) 316 (1819) ("power of taxing

(footnote continued)

would be impaired by requiring state court jurisdiction over § 1983 claims, see Interest of Amici Curiae, supra, a valid excuse for declining such jurisdiction exists.^{43/}

(footnote continued)

. . . is an incident of sovereignty"); Prigg v. Pa., 41 U.S. (16 Pet.) 539, 614 (1842) ("every state . . . has the exclusive right to prescribe the remedies in its own tribunals"); Brown v. Gerdes, 321 U.S. at 190 (Frankfurter, J., concurring) ("whether a state court can take jurisdiction . . . [is] wholly within the control of the State creating the court and without the power of Congress").

43/ See Tribe, Intergovernmental Immunities, supra at 694-97; Redish & Muench, supra at 344; Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551, 1558 n. 52 (1960); Sandalow, supra at 206-07; Developments in the Law, Section 1983 & Federalism, supra at 1177-80.

A final and equally valid excuse for declining jurisdiction over petitioners' § 1983 claim is that state court jurisdiction over federal claims cannot be required to any greater extent than is federal jurisdiction over the same claims. Since federal jurisdiction over the tax refund claim at issue here would be barred by the Eleventh Amendment, by principles of comity, and by 28 U.S.C. § 1341, the state courts can legitimately decline to hear the same claims without creating any Supremacy Clause concerns.^{44/} As stated in Missouri v.

^{44/} See Brillmayer & Underhill, Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules & the Conflict of the Laws, 69 Va. L. Rev. 819, 838 (1983); Gordon & Gross, Justiciability of Federal Claims in State Court, 59 Notre Dame L. Rev. 1145, 1154 (1984); State Tax Commission v. Fondren, 387 So. 2d at 723; Backus v. Chilivis, 224 S.E. 2d at 374.

Mayfield, 340 U.S. at 6 (Jackson, J., concurring), "Certainly a State is under no obligation to provide a court for . . . a . . . cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case."

III. THE STATE COURT ACTED WITHIN THE SCOPE OF ITS DISCRETION IN DECLINING TO AWARD ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988.

Even if the South Carolina court was required to entertain petitioners' § 1983 claim, it does not follow that the court was also required to award attorney's fees under § 1988. Section 1988 on its face does not require that attorney's fees be awarded to every prevailing party but only that "the court, in its discretion, may allow the prevailing party

. . . a reasonable attorney's fee" (emphasis added). As aptly stated in Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980), "'may' sometimes means 'won't'".

The legislative history of § 1988 also emphasized the value of judicial discretion in restraining inappropriate fee awards. The House Report states:

The second feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes requiring that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8.^{45/} See also Hutto v. Finney, 437 at 709 n. 6 (Powell, J. , concurring) ("there is nothing in the Act that

^{45/} Approximately half of the federal fee-shifting statutes are expressly mandatory. M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 5.02[2] (1983).

requires the routine imposition of counsel-fee liability on anyone"). As will be shown here, the lower court properly exercised its discretion to deny fees in this case.

First, as in Smith v. Robinson, 104 S. Ct. at 3468 n. 12, the § 1983 claim here "added nothing to petitioners' claims" and "had nothing to do with plaintiff's success." Petitioners prevailed solely on their state-law cause of action, based entirely on the same constitutional claims they sought to raise under § 1983. As recognized in Smith, the fact that petitioners' § 1983 claim was superfluous "provides a . . . basis for denying attorney's fees on the basis of that claim." Id. Indeed, "where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success,

Hensley v. Eckerhart, [103 S. Ct. 1933 (1983)], requires that fees not be awarded on the basis of those claims" (emphasis added). Id. Under similar circumstances a number of courts have declined to award fees in cases where the § 1983 claim serves no purpose other than as a "conduit" for attorney's fees.^{46/} As several members of this Court anticipated, requiring that fees be awarded in such circumstances would enable

ingenious pleaders [to] find ways to recover attorney's fees in almost any suit against a state defendant. Nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 suggests that Congress intended to remove so completely the protection of the "American Rule" in suits against

^{46/} See, e.g., Anderson v. Thompson, 658 F.2d 1203 (7th Cir. 1981); Roberts v. Mills, 291 Or. 21, 628 P.2d 714, 715 (1981); Brown v. Hornbeck, 458 A.2d at 904.

state defendants.^{47/}

A second justification for the discretionary denial of fees in this case derives from the substantive nature of petitioners' underlying claim. Even if that claim falls within the scope of § 1983, but see section I, supra, it is not the type of civil rights claim that § 1988 was primarily intended to encourage. The legislative history of § 1988 clearly indicates that Congress intended not to shift liability for attorney's fees in all cases against state defendants, but to encourage private enforcement of the most "basic" and "fundamental" civil rights.^{48/}

^{47/} Maine v. Thiboutot, 448 U.S. at 24-25 (Powell, Burger, & Rehnquist, JJ., dissenting). See also Brown v. Hornbeck, 458 A.2d at 905.

^{48/} H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976); S. Rep. No. 1011, 94th

(footnote continued)

Although it is now clear that § 1983 encompasses deprivations of at least some non-civil rights and that such deprivations may give rise to attorney's fees under § 1988, see Maine v. Thiboutot, 448 U.S. at 8-11, it is nevertheless appropriate for courts to give effect to the limited congressional intent underlying § 1988--to protect civil rights--by exercising their discretion to deny fees more readily in non-civil rights cases or cases where the interests at stake

(footnote continued)

Cong., 2d Sess. 2, reprinted in 1976 U.S.Code Cong. & Ad. News at 5909-10; 121 Cong. Rec. 26,806 (remarks of Sen. Tunney) (1975); 122 Cong. Rec. 31,472 (remarks of Sen. Kennedy), 35,115 (remarks of Rep. Anderson), 35,124 (remarks of Rep. Railsback); 35,126 (Remarks of Rep. Fish), 35,127 (remarks of Rep. Holtzman) (1976).

are more private than public in nature.^{49/} Thus, in this case, which cannot be characterized as a traditional civil rights action, see section IB, supra, the South Carolina court's exercise of its discretion to deny fees was particularly appropriate.

^{49/} See, e.g., Boland v. City of Rapid City, 315 N.W. 2d at 503; Green v. Car-bough, 460 F.Supp 1193, 1194-95 (E.D. Va. 1978); Martin v. Hancock, 466 F.Supp. 454, 455-56 (D. Minn. 1979); Thiboutot v. State, 405 A.2d at 240; Case Comment, Statutory Non-Civil Rights Violations of Section 1983 and Awards of Attorneys' Fees After Maine v. Thiboutot, 61 B.U.L. Rev. 1069, 1087-89 (1981).

CONCLUSION

For all of the reasons discussed above and in the Brief for Respondents, this Court should affirm the judgment of the Supreme Court of South Carolina.

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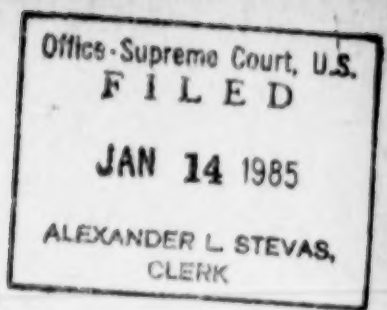
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-249

ROGER L. SPENCER, ET UX,

Petitioners,

versus

SOUTH CAROLINA TAX COMMISSION, ET AL.,

Respondents.

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Is a state court required to entertain the remedy of 42 U.S.C. § 1983 where the state has nondiscriminatory laws limiting its jurisdiction and where such remedy is sought to be used in a dispute concerning state income taxes for which the state provides an adequate remedy?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional Provisions and Statutes involved set forth by the petitioners need to be supplemented by the following:

State and Local Fiscal Assistance
Act of 1972, 26 U.S.C.
§§ 6361-6365 (Brief of Re-
spondents, Appendix A, page
1a)

South Carolina Code of Laws, 1976,
as amended, § 12-47-10 (Brief
of Respondents, footnote 17)

South Carolina Code of Laws, 1976,
as amended, § 12-47-50 (Brief
of Respondents, footnote 18)

South Carolina Code of Laws, 1976,
as amended, § 15-53-20 (Brief
of Respondents, footnote 22)

South Carolina Code of Laws, 1976,
as amended, § 15-53-30 (Brief
of Respondents, footnote 23)

SUMMARY OF ARGUMENT

The decision of the South Carolina Supreme Court to decline the remedy of 42 U.S.C. § 1983 sought by the petitioners in a tax dispute was

proper since such refusal was nondiscriminatory in that state-created remedies would likewise have been dismissed. Further, neither the literal language of § 1983, the legislative history of such enactment, nor the history of subsequent congressional state tax enactments express any intent to impose upon the states a mandatory state tax remedy. On the contrary, such legislative history demonstrates Congress intended states to administer their own revenue systems without mandatory remedies imposed by Congress.

I

The United States Constitution under the Supremacy Clause does not require that a federal remedy be entertained by a state court where a neutral nondiscriminatory state provision

prohibits hearing both state and federal actions. This nondiscrimination rule has been established in Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 32 S.Ct. 169 (1912) and Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810 (1947), and it is further established that lack of subject matter jurisdiction of the state court is a proper reason for declining a federal remedy so long as such lack of jurisdiction is applied in a nondiscriminatory manner. Mondou, supra, Testa, supra and Herb v. Pitcairn, 324 U.S. 122, 65 S.Ct. 459 (1945).

In the instant case, the South Carolina courts properly declined the § 1983 remedy since their subject matter jurisdiction over tax disputes by a taxpayer is limited by §§ 12-47-10¹ and

¹See footnote 17 for the exact language of § 12-47-10.

12-47-50², South Carolina Code of Laws, 1976, as amended. Such sections limit the jurisdiction of South Carolina's courts by specifying that no remedy other than those identified in Chapter 47 of Title 12, South Carolina Code of Laws, 1976, shall be allowed and specify that no order or process of any kind shall be issued by any court so as to interfere with state tax collection. This lack of jurisdiction rule applies to state as well as federal claims on a nondiscriminatory basis. For example, South Carolina courts have consistently and repeatedly denied the state-created declaratory judgment remedy³ and the remedy of an injunction⁴ when sought by

² See footnote 18 for the exact language of § 12-47-50.

³ See text accompanying footnote 26.

⁴ See text accompanying footnote 27.

a taxpayer in a tax dispute. In short, South Carolina's courts are closed to all parties seeking remedies other than those remedies for which jurisdiction has been granted. Since the South Carolina courts had no jurisdiction over § 1983 remedies concerning taxes and since such jurisdictional limitation is applied on a nondiscriminatory basis to all remedies whether state or federal, South Carolina's decision to not entertain the remedy of § 1983 was proper.

Further, it is clear under Georgia R.R. & Banking Co. v. Musgrove, 335 U.S. 900 (1949) and Ward v. Love County, 253 U.S. 17 (1920), that as long as the State has provided an adequate remedy, the Constitution does not compel a state to disregard its lack of jurisdiction nor to require the state court to

provide an avenue for a federal remedy. Here the remedy of payment under protest with suit within thirty days as provided by § 12-7-220⁵, South Carolina Code of Laws, 1976, as amended, is an adequate remedy. Such satisfies the requirements of an adequate remedy explained in Rosewell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 1229 (1981), since a taxpayer under § 12-47-220 may raise any and all constitutional objections he wishes to assert.

II

Congress has not enacted a mandatory state tax remedy upon state courts through § 1983. Neither the literal language nor the congressional intent found in the legislative history

⁵ See Petition for Writ of Certiorari at Appendix E, page 26 for exact language of § 12-7-220.

of the statute demonstrates such an intent. In fact, subsequent acts of Congress show congressional intent that the states administer their own tax systems unimpeded by federal intervention.

In deciding if § 1983 creates a mandatory state tax remedy in state court, the literal language of the statute is of little help. The statute provides a remedy but gives no guidance on where such remedy is to be obtained nor does the language address the appropriateness of such a remedy for litigating a state tax dispute in state court. In light of such, the legislative history of § 1983 and subsequent acts of Congress dealing with the same subject of state taxation for which § 1983 is now being asserted become relevant to determine legislative intent.

The legislative history of § 1983 as reviewed in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961), demonstrates that such was primarily designed to provide a federal remedy in a federal court and Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 102 S.Ct. 2557, 2562, found § 1983 to be designed to "throw open the doors of the United States Court". Thus, there is no indication in the legislative history that the statute was addressed at either state tax systems or mandatory state acceptance of such actions.

However, the legislative history of the Tax Injunction Act, 28 U.S.C. 1341,⁶ and the State and Local Fiscal Assistance Act of 1972, 26 U.S.C.

⁶See Petition for Writ of Certiorari at Appendix E, page 25a for exact language of 28 U.S.C. § 1341.

§§ 6361-6365⁷ demonstrate Congress acknowledged and accepted the basic payment under protest remedy utilized in state tax systems. The legislative history of § 1341 shows Congress was concerned with foreign corporations obtaining injunctions against state taxes and not paying the tax before suit thus impeding state tax collection. Local citizens were unable to use the injunction route. A view that § 1983 is mandatory will give the very result Congress sought to remove under § 1341 since any taxpayer who can structure his complaint under § 1983 would be able to proceed to court without having paid the tax. Thus, the state would be deprived of its revenue until the action was ended. Since the view of § 1983

⁷See Brief for the Respondents at Appendix A, page 1a for pertinent parts of exact language of 26 U.S.C. § 6361.

advanced by the petitioners is directly contrary to the intent of § 1341, § 1983 cannot be mandatory upon state courts in tax disputes. Likewise, the history of § 1341 shows Congress knew that states required exhaustion of administrative remedies and approved of such. However if § 1983 is a mandatory state tax remedy in state court, Patsy, supra, eliminates such requirement and again the intent of Congress in § 1341 would be defeated by petitioners' view of § 1983.

Further, Congress showed no inclination toward a mandatory state tax remedy in state court in its enactment of the State and Local Fiscal Assistance Act. There Congress authorized the Federal Government, with the states' consent, to collect state income taxes and litigate any disputes arising from such taxes. However, states were not

required to accept such an offer. Thus, Congress expressed an intent to become involved in state tax systems only on a purely voluntary basis fully acceptable to the state. Such a voluntary approach is directly contrary to the mandatory approach advanced by petitioners.

Finally, § 1983, neither in its language nor history, makes the necessary clear statement of intent required of Congress where Congress seeks to invade a fundamental state area such as a state tax system. Also, such a mandatory view of § 1983 for tax disputes in state court would in many instances abrogate the state's sovereign immunity which view also requires a clear statement of such being the intent of Congress. Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979), holds that § 1983 expresses no such clear statement to abrogate state

sovereignty. Since Congress in § 1983 has made no clear statement of its intent to invade such a fundamental state interest as a state's fiscal lifeblood or to abrogate the state's sovereign immunity, this court should not hold § 1983 to be a mandatory state tax remedy in state courts. If such a decision is to be made, Congress is the body that should make it. There the opportunity for debate and fact finding would insure the protection of the interest of all parties, be they states or taxpayers. Section 1983 and its history simply do not yield the evidence to support congressional intent to subject states to federally imposed state tax remedies in the states' own courts. In the absence of such evidence, § 1983 was properly declined by the South Carolina Supreme Court and its decision to so decline should be upheld.

ARGUMENT

South Carolina's refusal to entertain the 1983 action in the instant case is proper since the refusal is not a violation of the United States Constitution; acceptance of the action is not compelled by the language of § 1983; and congressional intent demonstrates that state tax matters shall be pursued in state courts in a manner determined by the state.

I. The Constitution Does Not Obligate State Courts To Entertain An Action Pursuant To § 1983 Where Such Concerns State Taxes.

A. The Supremacy Clause⁸ does not

⁸The Supremacy Clause, Article VI, § 2: This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be

require a state court to entertain a § 1983 action where there is no discrimination against the federal claim resulting from the refusal of such claim. This Court has on several occasions addressed the issue of a state court declining to entertain a federal remedy. Such cases, as analyzed below, hold that no Supremacy Clause violation occurs where the state rule treats both state and federal claims the same. In other words, where there is no discrimination against the federal claim there is no constitutional violation.

In Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 32 S.Ct. 169 (1912),

the supreme law of the land;
and the judges in every state
shall be bound thereby,
anything in the Constitution
or laws of any state to the
contrary notwithstanding.

a citizen of Connecticut sued his employer in the state courts of Connecticut pursuant to the Federal Employers Liability Act (FELA). The Connecticut Supreme Court held that a right of action under the FELA could not be enforced in state court since the policy of Connecticut was not in accord with the federal law⁹ and to enforce such a law would be "inconvenient and confusing". Mondou 32 S.Ct. at 177.

This Court found these reasons to be insufficient. Further the Court found Connecticut did entertain

⁹Mondou 32 S.Ct. at 171. There was a conflict between state and federal policies. For example, the FELA abrogated the fellow-servant rule, extended a carrier's liability to cases of death and restricted the defenses of contributory negligence and assumption of risk, all of which opposed Connecticut's policies. Mondou 32 S.Ct. at 174-175.

analogous rights created under its law but denied enforcement of the federal right. The case was remanded for further proceedings thereby directing the state to entertain the action. However, in the opinion, the following was specifically noted:

"* * * we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure." Mondou 32 S.Ct. at 178.

As a result of Mondou, it became clear that a state would not be required to entertain a federal cause of action

if the state under "its ordinary jurisdiction as prescribed by local law" would not entertain state created causes of actions. In other words, lack of jurisdiction applied to the federal claim in a manner which is nondiscriminatory is a valid basis for not entertaining such claim. This rule was reaffirmed in Minneapolis & St. Louis R. R. v. Bombolis, 241 U. S. 211, 36 S. Ct. 595 (1916) where the Court held that "the principle upon which the Mondou case rested"¹⁰ was that the state court would enforce the federal right not because the duty came from the federal government, but rather because its ordinary jurisdiction allowed it "within the scope of its authority".¹¹

¹⁰Bombolis 36 S.Ct. at 598-599.

¹¹Ibid.

The nondiscrimination view of Mondou, was most clearly presented in Douglas v. New York, N.H. & N.H. & H. Railroad, 279 U.S. 377, 49 S.Ct. 355, 356 (1929). There this Court held that the FELA did not require state courts to entertain such suits where there was a valid excuse for so declining. The Court in Douglas found that a valid excuse for not entertaining the FELA suit was the fact that New York declined the federal cause of action on the same grounds that it would have declined New York's causes of action.¹²

¹²A Connecticut resident brought an action against a Connecticut corporation for an injury which occurred in Connecticut. However, the action was brought in New York's courts. The New York court dismissed the action since its law provided that nonresidents could sue foreign corporations in New York's courts only in certain classes of cases. The current action did not fall within the special classes. The court found that the statute would also limit

The nondiscrimination rule was again applied in McKnett v. St. Louis & S. F. Railway, 292 U.S. 230, 54 S.Ct. 690 (1934). Alabama had a statute which discriminated against the FELA claim by allowing suits in its courts on state claims that were based upon its own laws or laws of sister states but would not entertain claims that arose from federal law.¹³ Since such a statute clearly discriminated against the federal claim, the Court

citizens of New York who were nonresidents of New York. Since New York would have dismissed an analogous state claim on the same grounds it dismissed the federal claim, there was no discrimination and hence a "valid excuse" for dismissing the FELA claim.

¹³Alabama's courts had general jurisdiction over the class of actions to which the FELA claim belonged and thus would have enforced state created claims. McKnett 54 S.Ct. at 691.

reversed Alabama's decision denying jurisdiction.

The view expressed in Mondou was firmly established by 1945 when the Court again examined an FELA action brought in state court. In Herb v. Pitcairn, 324 U.S. 122, 65 S.Ct. 459 (1945), the Illinois Supreme Court found that no action had been commenced in its courts within the two year period required by the federal act since such action had been brought in a city court that had no jurisdiction.¹⁴ The issue in Pitcairn in this Court of whether an action had been commenced within the two

¹⁴The city court had no jurisdiction since in Weiner v. Illinois Central R. Co., 42 N.E. 2d 82 (1942) and Mitchell v. Louisville & N.R. Co., 42 N.E. 2d 86 (1942), the Illinois Supreme Court found that city courts lacked subject matter jurisdiction of causes of action that arose outside the city in which the court was located. In the Pitcairn case, the action arose outside the city in which the action was brought.

year period was left unanswered.¹⁵

After finding that the limits of the jurisdiction of an Illinois court is a state law question, this Court found that the jurisdictional rules were not used to discriminate against the FELA

¹⁵This Court was not able to decide the issue since the Illinois Supreme Court used other state grounds for supporting its decision and it was uncertain upon which ground the case was decided. Since this Court is reluctant to review a case which may have been decided upon an adequate state ground, the causes were continued to allow the parties to petition the Illinois Supreme Court for clarification. In clarification reported in 64 N.E. 2d 318 (1945), Illinois found that the two year period had expired since commencing an action means starting it in a court that has power to decide the matter. This Court in Herb v. Pitcairn, 325 U.S. 77, 65 S. Ct. 954 (1945) disagreed and found that commencing an action under an FELA claim began with service of process. Thereupon the matter was remanded to the Supreme Court of Illinois for further proceedings not inconsistent with the opinion. Since such service was within two years the action was timely.

claim since state law claims would also have been dismissed. Pitcairn 65 S.Ct. at 462. This Court held that if the FELA claim was dismissed on such a ground that such dismissal would have been proper. Thus the rule of there being no discrimination in dismissing federal claims where state claims would also be dismissed was again applied.

Nondiscrimination was again the approach applied two years later in Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810 (1947). There a plaintiff attempted to use the courts of Rhode Island to recover on a federal claim under Section 205(e) of the Emergency Price Control Act. The act allowed treble damages for violations of the act. However, just as in Mondou, supra, Rhode Island's policies were in conflict with the

federal policy, since Rhode Island did not enforce penal statutes and the federal claim was found by Rhode Island to be such a statute. Testa 67 S.Ct. at 812. Thus, Rhode Island refused to entertain the federal claim.

In reversing the Rhode Island Supreme Court's decision, Testa utilized the nondiscrimination analysis. Testa found that since in fact Rhode Island enforced other "penal" statutes (the double damages under the Fair Labor Standards Act, 29 U.S.C.A. § 201), the Rhode Island courts had jurisdiction over penal statutes. To refuse the treble damages of the Emergency Price Control Act would be discriminatory and therefore forbidden. Testa 67 S.Ct. at 814-815.

The site of authority in Testa to McKnett, supra, is enlightening since

that case concerned a statute which flagrantly discriminated against an FELA claim. Likewise, the instruction by Testa to compare Pitcairn, supra, further shows reliance upon the nondiscrimination rule since Pitcairn found a valid refusal for not hearing an FELA suit was the equal treatment of state and federal claims.

Further support for the view that Testa was based on a nondiscrimination analysis is found in the recent case of this Court in Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 102 S.Ct. 2126 (1982). Section 210 of the Public Utility Regulatory Policies Act (PURPA) required each state utility regulatory authority to "adjudicate disputes arising under the statute". FERC v. Mississippi 102 S.Ct. at 2137.

This Court cited both Testa and Mondou in finding there was no limitation on the Mississippi Commission's jurisdiction under local law to entertain claims under PURPA. Thus, the jurisdiction to hear the PURPA claim prevented declining such claim since such would be discriminating against the federal claim. Justice O'Connor and Justice Powell in each of their concurring and dissenting opinions agreed with the nondiscriminatory view. FERC v. Mississippi 102 S.Ct. at 2146 and 2145.

Finally, only three years after Testa, Missouri ex rel Southern Ry. v. Mayfield, 340 U.S. 1, 71 S.Ct. 1 (1950), was decided utilizing the nondiscrimination approach in an FELA action.¹⁶ Missouri found that it had no

¹⁶The action was brought in Missouri's

choice but to deny the request to apply forum non conveniens. Upon review, this Court found that nothing prohibited a state court from applying the forum non conveniens rule in FELA actions so long as it applied the rule to state claims in the same manner and thus did not discriminate against the federal claim. Mayfield 71 S.Ct. at 3.

state courts. Nonresidents were seeking recoveries from a foreign corporation for injuries which were not incurred in Missouri. Thus much as in Douglas, supra, the primary contacts were outside of Missouri. Motions invoking the doctrine of forum non conveniens were filed by the defendants but denied by the trial court. Writs of Mandamus were sought from the Missouri Supreme Court to compel the trial court to apply the doctrine. The Missouri Supreme Court refused to compel the trial court to grant the relief sought. The Court held that the trial court was required to entertain the FELA action since it allowed Missouri citizens to entertain such actions. Because of such, it could not dismiss an FELA action filed by a nonresident. State ex rel Southern Ry. Co. v. Mayfield, 224 S.W. 2d. 105 (1949).

These cases establish the nondiscrimination rule and Testa, supra, specifically recognizes that the lack of subject matter jurisdiction is a proper nondiscriminatory basis for declining a federal cause of action. As the following discussion demonstrates, the South Carolina courts properly declined the § 1983 claim since their jurisdiction did not extend to such claims.

B. By declining to hear the § 1983 claim because of a lack of subject matter jurisdiction, the South Carolina courts did not discriminate against such claim since lack of jurisdiction, when applied to both state and federal remedies, is proper under Testa, supra. Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 815. South Carolina courts have limited jurisdiction in actions brought

by taxpayers challenging a tax assessment with such limitations being set forth by § 12-47-10¹⁷, South Carolina Code of Laws, 1976, as amended, and § 12-47-50¹⁸ South Carolina Code of

¹⁷The collection of State, county, city, town and school taxes and taxes voted by townships in aid of railroads when the roads have been completed through such townships shall not be stayed or prevented by any injunction, writ or order issued by any court or judge. And no writ, order or process of any kind whatsoever staying or preventing the Tax Commission or any officer of the State charged with a duty in the collection of taxes from taking any steps or proceeding in the collection of any tax, whether such tax is legally due or not, shall in any case be granted by any court or the judge of any court.

¹⁸There shall be no other remedy than those provided in this chapter in any case of the illegal or wrongful (a) collection of taxes, (b) attempt to collect taxes or

Laws, 1976, as amended¹⁹. Thus, South

(c) attempt to collect taxes in funds or moneys which the county treasurer shall be authorized to receive under the law other than such as the person charged with such taxes may tender or claim the right to pay.

¹⁹At page 20 of petitioners' Brief, petitioners assert that no one has questioned the state court's jurisdiction over the Spencers' federal cause of action, that the South Carolina Supreme Court admitted it had jurisdiction, and that respondents conceded that the state courts have jurisdiction. Such assertions are a flagrant disregard of the record before this Court. The Transcript of Record before the South Carolina Supreme Court, at page 2 in the Statement of the Case, shows the respondents' position was that "the court is without jurisdiction to hear the action, * * *." Again in the Transcript before the South Carolina Supreme Court, at page 19, the entire Fourth Defense challenges the court's jurisdiction and directly disputes jurisdiction under § 1983. The oral argument before the trial court, at page 30 of the Transcript of Record from lines 20-22, asserts that only § 12-47-220 can confer jurisdiction on the court. The respondents' Brief to the South Carolina Supreme Court, at page 7, directly cites §§ 12-47-10 and 12-47-50, which statutes are limitations denying jurisdiction. The South Carolina

Carolina's courts are closed to all

Supreme Court by merely recognizing that Martinez v. State of California, 444 U.S. 277 (1980) and Maine v. Thiboutot, 448 U.S. 1 (1980) allow concurrent jurisdiction certainly did not make a statement that South Carolina courts had jurisdiction. Likewise, respondents' Statement, at page 4 of its Brief in Opposition, was not a concession that South Carolina courts had jurisdiction. Such was meant only to assert that the mere existence of and finding of concurrent jurisdiction was not sufficient to require state courts to accept jurisdiction. In fact, one of the cases cited, at page 4, to support such position was Herb v. Pitcairn, supra, which itself was based on a court declining an FEHA claim where there was lack of jurisdiction. Petitioners' assertions are most puzzling not only in light of the record before the court but also in light of the rule that subject matter jurisdiction may be raised at any time and this court may inquire into the jurisdiction of the lower court even if such was conceded (which is clearly not the case here) in the State Supreme Court. Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, 68 S.Ct. 426 (1948). Based upon the record and the nonwaivability of subject matter jurisdiction, the petitioners' assertions are patently inaccurate.

parties who seek to challenge a state income tax assessment in a manner other than under the remedies for which jurisdiction is provided by the General Assembly in Chapter 47 of Title 12, South Carolina Code of Laws, 1976, as amended. Such is true whether the remedy is state created, such as declaratory judgment or injunction, or whether the remedy is a federal creation such as § 1983. Such uniform treatment by the state resulting from limits imposed by "its ordinary jurisdiction as prescribed by local law"²⁰ shows no discrimination and is a proper basis for not entertaining the § 1983 claim.²¹

²⁰ Mondou, supra, 32 S.Ct. at 178.

²¹ Brillmayer & Underhill, Constitutional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws, 69 Virginia Law Review 819 at 838.

South Carolina's courts have declined state claims by taxpayers challenging tax statutes on the basis of lack of jurisdiction on several occasions. In Elmwood Cemetery Association v. Wasson, 253 S.C. 76, 169 S.E.2d 148 (1969), a taxpayer sought to utilize both a declaratory remedy as well as an injunctive remedy. The declaration sought was that the taxpayer was exempt from income tax and the injunctive remedy sought to restrain the Tax Commission from assessing or collecting any tax against the taxpayer. The South Carolina Supreme Court declined to grant either remedy by finding that state law was clear in holding that only the remedy of payment

"States may refuse to adjudicate federal claims when the jurisdictional restriction applies neutrally to exclude claims based on state laws as well."

under protest and suit within thirty days under what is now § 12-47-220 was provided by the General Assembly of South Carolina.

A further limitation of the court's jurisdiction was explained in a later action of Elmwood Cemetery Association v. South Carolina Tax Commission, 255 S.C. 457, 179 S.E. 2d 609 (1971). A single assessment for multiple tax years was made by the Tax Commission. The taxpayer attempted to combine two remedies in one action. One remedy complied with the payment under protest provision as to a tax liability for the tax year 1949 while the other remedy was a declaratory remedy seeking a declaration that the corporation was exempt for tax years after 1949. The South Carolina Supreme Court found that

even though an action was properly before it under § 12-47-220, it had jurisdiction only over the remedy provided in that section. Thus, only the 1949 tax year was before the court, whereas the court was "without jurisdiction" of the declaratory remedy. Elmwood 179 S.E.2d at 611-612.

The similar situation existed in the instant case. The petitioners established their remedy under § 12-47-220 by paying the tax under protest and bringing an action at law within thirty days. The petitioners added a remedy under declaratory relief seeking to establish jurisdiction under § 15-53-20²², South Carolina Code of

²²Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not

Laws and § 15-53-30²³, South Carolina Code of Laws, 1976, as amended.²⁴

further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

²³Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

²⁴Transcript of Record before the South Carolina Supreme Court, Amended Complaint, page 7, allegations at paragraph IV. It should be noted that petitioners cited § 15-77-50 as a jurisdiction-granting section also in

Further a remedy under § 1983 was added.²⁵ The denial of the declaratory remedy for lack of jurisdiction is clear under Elmwood Cemetery Association v. Wasson, supra, and Elmwood Cemetery Association v. South Carolina Tax Commission, supra, since the court only had jurisdiction over the exclusive remedy of § 12-47-220.²⁶ Likewise the

paragraph IV. However, Harrison v. South Carolina Tax Commission, 261 S.C. 302, 199 S.E. 2d 763 (1973), provides that such section grants no jurisdiction to sue the Tax Commission but rather is only a venue statute.

²⁵ Transcript of Record before the South Carolina Supreme Court at page 13, Amended Complaint, allegation XXII.

²⁶ The holding of Elmwood Cemetery Association v. Wasson, supra, denying jurisdiction over declaratory remedies was also confirmed in Perpetual Building and Loan Association v. South Carolina Tax Commission, 255 S. C. 523, 180 S. E. 2d 195, 197 (1971).

lack of jurisdiction over § 1983 is apparent for the same reason of exclusive remedies denying jurisdiction pursuant to § 12-47-10 and § 12-47-50. Thus state and federal claims are uniformly submitted to the same jurisdictional limitations.

The remedy of injunction has also been denied to state law claims due to the adequate remedy of § 12-47-220 and exclusiveness limitations on jurisdiction placed by § 12-47-50. In repeated instances, the South Carolina Supreme Court has affirmed the view that its courts have no jurisdiction to issue an injunction where § 12-47-220 is involved since such section is an adequate remedy.²⁷

²⁷ Fleming v. Power, 77 S.C. 528, 58 S.E. 430 (1907), Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 58 S.E. 811 (1907),

It is established that a state court need not entertain a federal remedy unless the state's "ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion". Testa, 67 S.Ct. at 815 and Mondou, 32 S.Ct. 178. The South Carolina courts have limited jurisdiction over challenges to a tax liability as in the instant case. Sections 12-47-10 and 12-47-50. The limitations on the jurisdiction of the South Carolina

Aetna Fire Ins. Co. v. Jones, 78 S.C. 445, 59 S.E. 148 (1907), Ex Parte Tillman, 84 S.C. 552, 66 S.E. 1049 (1910), Bank of Johnston, et al. v. Prince, 136 S.C. 439, 134 S.E. 387 (1926), Western Union Tel. Co. v. Query, 144 S.C. 234, 142 S.E. 509 (1927), Santee River Cypress Co. v. Query, 168 S.C. 112, 167 S.E. 22 (1932), Sutton, et al. v. Town of Fort Mill, 171 S.C. 291, 172 S.E. 119 (1933), Home Building and Loan v. City of Spartanburg, 185 S.C. 353, 194 S.E. 143 (1937), Textile Hall Corp. v. Riddle, 207 S.C. 291, 35 S.E.2d 701 (1945), Prudential Ins. Co. v. Murphy, 207 S.C. 324, 35 S.E.2d 586 (1945).

courts have been applied to prohibit state created claims on numerous occasions and have been the law in South Carolina since the 1870's.²⁸ Since the

²⁸The prohibition on injunction, writs or orders which prevent efforts to collect taxes was enacted on February 28, 1870 (14 Stat. 367) and was found as a constitutional limitation of the courts jurisdiction in State v. Treasurer, 4 S.C. 525 (1873), State v. Gaillard, 11 S.C. 310 (1878) and Chamblee v. Tribble, 23 S.C. 70 (1884). In 1878, the General Assembly enacted "an Act to Facilitate the Collection of Taxes" (1878 Stat. 785) which contained the language of what is now § 12-47-220. Such Act also contained the language of § 12-47-50 which now limits remedies in tax disputes to the remedies specified within Chapter 47 of Title 12, South Carolina Code of Laws, 1976, as amended. The Income Tax Act of 1926 (1927 Stat. 1) at § 31 and § 32 applies the limits on jurisdiction of § 12-47-10 and § 12-47-50 to income taxes as well as authorizing jurisdiction over the payment under protest remedy of § 12-47-220. It should also be noted that Chapter 47 does contain a remedy at § 12-47-440 which allows a claim for refund to be filed, which after being denied entitles the taxpayer to recover his refund by a timely filed action in the state court.

jurisdictional limitations are applied in a uniform, nondiscriminatory manner against all remedies whether state or federal, South Carolina properly declined to entertain the § 1983 remedy.

C. The Supremacy Clause does not compel a state court to disregard its lack of jurisdiction over the § 1983 remedy so long as an adequate remedy is available under state law. As recently as 1944, Brown v. Gerdes, 321 U.S. 178, 64 S.Ct. 487, 493 (1944) (concurring opinion of Justice Frankfurter) explained that states are free to control their own jurisdiction and that no intent should be found that the Supremacy Clause mandates jurisdiction over a federal right in a state court. The leading case in which this Court has required a state court to entertain an

action alleging a constitutional violation even where there was a lack of jurisdiction in the state court is General Oil Co. v. Crain, 209 U.S. 211 (1908).

The plaintiff in Crain brought a suit in Tennessee seeking an injunction against a state official charged with enforcement of an inspection tax. The suit argued the tax was unconstitutional as a violation of interstate commerce and the Fourteenth Amendment. The Tennessee Supreme Court found it had no jurisdiction to issue the injunction since it was prohibited by statute. This court was presented with the argument that the case involved no federal question since it concerned only the jurisdiction of the courts of Tennessee and that Tennessee was the

final authority of that issue. This court concluded that it had jurisdiction over the matter since protection to a constitutional right could be lost if this Court had no right to review an action which would be denied review in the federal courts under the Eleventh Amendment and also denied in the state court. Thus the review by this court was granted because the plaintiff had no other remedy, and unless review was allowed, the constitutional claim would have been lost. That this conclusion is correct is supported by the case of Georgia R. R. & Banking Co. v. Musgrove, 335 U.S. 900 (1949).

In Musgrove, the plaintiff asserted it had an exemption from state taxation granted to it by its charter from the state. The state threatened to assess

ad valorem taxes against the plaintiff who thereupon sought declaratory relief and an injunction against the proposed action. The plaintiff argued such action would be an impairment of obligation under its contract with the state as set forth in its charter. This Court dismissed the matter for lack of a federal question. Thus, under essentially identical facts as Crain, supra, the Musgrove court reached a different conclusion. The reason is that the court in Crain found there was no other remedy available for the plaintiff, whereas the court in Musgrove was aware that Georgia allowed a remedy of a suit for refund if the tax was actually assessed. The Court had previously held in Atchison, Topeka & Santa Fe Railway v. O'Connor, 233 U.S. 280, 285 (1912), that a taxpayer who is

relegated to a suit for refund of taxes has no constitutional complaint by being denied an injunction remedy against the collection of taxes.

Ward v. Love County, 253 U.S. 17 (1920), likewise shows that only where there is no adequate remedy in the state court will such court be required to hear a claim where there is no jurisdiction. In Ward, a federal statute provided an exemption from state taxation to members of the Choctaw Indian Tribe. A tax was illegally collected from the tribe members who then filed a suit to obtain a refund. However, the Oklahoma Supreme Court denied the refund suit for lack of jurisdiction since the taxes had been voluntarily paid and no statute authorized a remedy for taxes paid voluntarily. This Court reversed on the

grounds that the Fourteenth Amendment required a remedy. Thus again where the state court lacks jurisdiction, the state is required to entertain an action only where there is no adequate remedy.

An adequate remedy is provided in the instant case²⁹ and has been pursued by the petitioners in state courts under

²⁹ South Carolina's payment under protest provisions were found to be an adequate remedy so as to prohibit the issuance of an injunction in City Council of Augusta v. Timmerman, 233 Fed. 216 (C.C.A. 4th) (1916). Further, South Carolina has consistently allowed a taxpayer to raise any and all Constitutional issues he desires in an action under § 12-47-220. See for example, Atkinson Dredging Co. v. Thomas, 226 S.C. 361, 223 S.E.2d 592 (1976) (due process); Newberry Mills, Inc. v. Dawkins, 259 S.C. 7, 190 S.E.2d 503 (1972) (equal protection); Shasta Beverages v. South Carolina Tax Commission, 293 S.E.2d 429 (1982) (interstate commerce) as well as the instant case of Spencer v. South Carolina Tax Commission, ___ S.C. ___, 316 S.E.2d 386 (1984) (privileges and immunities clause). It is this ability to raise any and all Constitutional

§ 12-47-220.³⁰ Such being the case, the state court provided an adequate remedy and is not compelled to entertain the federal claim since it is without jurisdiction under the ordinary law of the state.

II. The Literal Language Of § 1983 Does Not Demonstrate That A State Must Entertain An Action Brought Pursuant To That Section.

The beginning point of any determination of the requirements of a statute must begin with the literal language of the statute involved since where the meaning is clear there can be no construction.³¹

objections that assure an adequate remedy. Rosewell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 1229 (1981).

³⁰ Petition for Writ of Certiorari at page 3.

³¹ Lewis v. United States, 92 U.S. 618, 23 L.Ed. 513 (1875).

Section 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The language gives no guidance as to whether a state is required to entertain such a suit. In fact, the statute says only that the offending person shall be liable. Thus, it provides only a remedy³² without

³² Chapman v. Houston Welfare Rights Organization, 441 U.S. 601, 617-618, 99 S.Ct. 1905, 1916 (1979).

designating where that remedy may be obtained. Such ambiguity could give rise to several conclusions³³ and it is this fact of various conclusions which demonstrates a need for statutory construction to determine the intent of Congress.³⁴

III. Congressional Intent Does Not Demonstrate That Section 1983 Compels A State To Entertain Actions Concerning State Income Taxes.

The intent behind § 1983 as it relates to compelling state courts to entertain suits concerning state taxes

³³Such conclusions could be that jurisdiction is vested solely in the federal courts (such conclusion has been found incorrect under Martinez, supra, and Maine v. Thiboutot, supra); jurisdiction is concurrent but actions are permissive in the state; actions are mandatory in the state in all events; or actions are mandatory in the state except for "valid excuses". (See for example Douglas v. N.Y., N.H. & H.R.R., 279 U.S. 386-387 (1929).)

³⁴Philbrook v. Glodgett, 421 U.S. 707, 95 S.Ct. 1893 (1975).

may be examined through the legislative history of § 1983 and other statutes relevant to state tax systems. Also an intent of Congress to intrude into a traditional and fundamental state function should be found only where there is a clear statement manifesting such intent. These approaches in determining the use of § 1983 concerning state income taxes will be shown below to demonstrate Congress had no intention of making such suits mandatory in state courts.

A. The legislative history of § 1983 cannot be read to find an intent requiring states to entertain claims concerning state income taxes. An extensive review of the history of § 1983 has been developed in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961).

Monroe explains that § 1983 grew

out of a message to Congress from President Grant on March 23, 1871. The message, warranted by evidence of the violence caused by the Ku Klux Klan, urged the passage of legislation which would secure "life, liberty and property and the enforcement of law in all parts of the United States". Monroe, supra, at 476, 477. The legislation known as the Ku Klux Act was directed at those who represented a state in some capacity who were either unable or unwilling to enforce state law. Monroe, supra, at 478.

During the debates, several purposes of Section 1 of the Act, now § 1983, were developed. First, it had the purpose of overriding certain kinds of state laws. This encompassed those laws which were passed by states with the purpose of infringing upon the rights of

citizens. The second purpose was to provide a remedy where state law was inadequate. Such laws were those which were insufficient to correct a wrong. The third purpose of § 1983 was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. These were laws which were proper protections for citizens but were not available in any practical sense since they were unenforced by the states. Monroe, supra at 478.

Monroe found that the primary purpose of § 1983 was to "afford a federal right in federal courts" since it was established that even adequate rights available at state law were of little value due to such not being enforced. Monroe then held:

"It is no answer that the state has a law which if

enforced would give relief. The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." Monroe, supra, at 482.

Thus, it is established that Congress in § 1 of the 1871 Act was attempting to establish a federal court for offenses that prior to such Act would have been matters heard in state courts under state remedies.

The view that § 1983 was primarily motivated to the providing of a federal forum was further substantiated by a review of the legislative history of § 1983 in Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 102 S.Ct. 2557 (1982). There, this Court

found first that in passing § 1 of the 1871 Act, Congress intended to "throw open the doors of the United States court" to individuals within the scope of the Act. Patsy at 2562. Second, this court found that Congress believed the fact-finding process in state courts was inadequate and that a federal court would be less susceptible to local prejudice. Patsy at 2563. Finally, Patsy found that the legislative history indicated some perceptions of legislators that the Act allowed concurrent jurisdiction. Patsy at 2563. However, such a view does not give any indication that such legislators believed the Act was mandatory on state courts.

The legislative history demonstrates that Congress did not intend to make § 1983 claims mandatory

upon state courts. Had Congress intended to accomplish such a result it is reasonable to believe that the issue would have been extensively debated. Given the significant legislative history addressed to providing a federal remedy in a federal court, there is no intent expressed to make § 1983 a mandatory remedy in the state courts.

B. The extent to which § 1983 was intended by Congress to create in the state courts a mandatory remedy concerning state taxes may be found by reviewing subsequent congressional enactments. Since in construing a statute it is always proper to presume Congress is aware of the law³⁵ and to examine statutes which deal with the

³⁵Cannon v. University of Chicago, 441 U.S. 667, 99 S.Ct. 1946, 1957-1958 (1976).

same subject of state taxation for which § 1983 is now being asserted, it is instructive to review the legislative history of two enactments to determine if such are consistent with the view that § 1983 created a mandatory state tax remedy. These enactments are the Tax Injunction Act³⁶ and the State and Local Fiscal Assistance Act of 1972, Title II, § 202(a) of Public Law 92-512.³⁷

1. The Tax Injunction Act (hereinafter § 1341) gives no indication that Congress was aware of § 1983 creating a mandatory state tax remedy in state courts. The legislative history of § 1341 demonstrates that Congress was concerned about inequities brought about by foreign corporations obtaining

³⁶28 U.S.C. § 1341.

³⁷26 U.S.C. §§ 6361-6365.

injunctions against state taxes.³⁸ Such corporations could establish diversity jurisdiction and obtain an injunction in federal court to prohibit the collection of state taxes whereas local citizens were forced to pay the tax first and then litigate. Section 1341 was designed to correct this problem.

It is ironic that finding § 1983 to be mandatory will give precisely the result § 1341 was meant to cure. If a taxpayer is able to structure his complaint so as to come within a mandatory § 1983 claim, South Carolina's anti-injunction statute of § 12-47-10 would fall under the Supremacy Clause and such taxpayer could litigate his tax dispute without first paying. All other

³⁸S. Rep. No. 1035, 75th Cong., 1st. Sess., 2 (1937).

South Carolina income taxpayers would have to pay before being able to litigate. The effect of such an approach would directly contradict what Congress clearly intended in § 1341. As this court has recognized, if the remedy sought by the taxpayer was available:

"* * * state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the * * * suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget and perhaps a shift to the State of the risk of taxpayer insolvency." Perez v. Ladesma, 401 U.S. 82, 128 n. 17, 91 S.Ct. 674, 699 n. 17 (1971) (Justice Brennan concurring in part and dissenting in part.)

The legislative history of § 1341 demonstrates that Congress was aware of the state's requirement that taxpayers pursue administrative remedies before

being able to litigate.³⁹ Grace Brethren Church, supra, concluded that congressional intent was that a remedy in state court was plain, speedy and efficient even though administrative and judicial remedies had to be pursued.⁴⁰ Again it is ironic that in spite of this congressional recognition, a mandatory § 1983 in state courts yields exactly the opposite of what Congress intended in § 1341. This is so since Patsy, supra, provides that no exhaustion of administrative remedies is required in § 1983 suits. Thus again, a taxpayer who

³⁹California v. Grace Brethren Church, 102 S.Ct. 2498 (1982), identifies the Johnson Act dealing with utilities as being the basis for § 1341. S. Rep. No. 125 73d Cong., 1st Sess., 3 (1933), shows that Congress required utilities to pursue their administrative and judicial remedies.

⁴⁰Grace Brethren Church, supra, at 2512.

is able to structure his complaint within § 1983 would effectively bypass all required administrative steps.⁴¹

In short, § 1341's history shows that Congress was well aware of the states' methods of collecting first and requiring suit later and of the states'

⁴¹Such would result in chaos in state taxation. In South Carolina, the cases of Columbia Developers Inc. v. Elliott, 269 S.C. 486, 238 S.E.2d 169 (1977), and Meredith v. Elliott, 247 S.C. 335, 147 S.E.2d 244 (1966), require administrative exhaustion in property tax matters. In 1981 (the year this action began) the South Carolina Tax Commission had 76,877 business personal property tax returns and made 5,109 real property assessments, according to the Tax Commission's 67th Annual Report. In addition, literally thousands of assessments are made by county tax officials which likewise are subject to the exhaustion rule. If such taxpayers bypassed local review boards or the review by the South Carolina Tax Commission, the South Carolina courts would unnecessarily be overburdened.

requirement of exhaustion of administrative remedies. It enacted § 1341 to prohibit an abuse by foreign corporations using injunctions to defeat the states' tax scheme. It is directly contrary to this expressed congressional consent to such a system to now conclude that § 1983 is mandatory upon the states in tax disputes. To so conclude would allow taxpayers to disregard and ignore state rules protecting collection of vital state taxes and to allow disputes to be settled by injunction and to deny the administrative exhaustion requirement.

2. In the State and Local Fiscal Assistance Act, (hereinafter the Act) Congress again expressed intent that supports the conclusion that § 1983 is not mandatory. The Act provides for an elective state tax collection system

administered by the Internal Revenue Service. Congress identified the judicial remedies that would be available for suits by the state taxpayer. It is significant to note Congress' intent not to intrude into the states' affairs.

Senate Report No. 92-1050 explains that the tax collection system is voluntary and nothing in the Act is to be construed as requiring the state to participate.⁴² Likewise, those who do participate are assured that the "principles of federalism" require that state constitutional matters will still be litigated by the state in its own court.⁴³

This congressional intent is in

⁴²U.S. Cong. and Adm. News, p. 3874, 3915-3916.

⁴³Ibid at page 3917.

conflict with that of the view that Congress intended § 1983 to be mandatory. In the Act, voluntary consent is the rule but under § 1983, as presented by petitioners, compulsion is the rule. Such conflict indicates § 1983 was never intended by Congress to be mandatory.

C. To find an intent by Congress to require state courts to entertain § 1983 claims concerning state income taxes intrudes into a fundamental state function and thus requires a clear statement of such intent. Since there is no clear expressed statement by Congress of mandatory state hearings for § 1983, no mandatory hearing of such claim for income taxes should be found. The general rule is well established that whenever a view of a statute is taken which either significantly changes

the federal-state balance⁴⁴ or abrogates the state's sovereign immunity⁴⁵ a clear statement of such intent is required. In the instant case, a mandatory § 1983 would change the federal-state balance by allowing a federal remedy for tax disputes to displace state remedies and abrogate the state's sovereign immunity protected in the concept of federalism. Each of these positions will be addressed in turn.

1. A federal statute which would create a remedy for state tax disputes would constitute a major shift in the

⁴⁴United States v. Bass, 404 U.S. 336, 92 S.Ct. 515 (1971).

⁴⁵Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979); Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666 (1976); Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614 (1973).

federal-state balance. This Court has acknowledged that taxes are the lifeblood of government⁴⁶ and has repeatedly acknowledged the significance of taxation to the states. In Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437 (1959), this Court found the states have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests.

Accordingly in arranging its affairs, the states are given wide latitude in creating its scheme of taxation.

Challenges to a tax under the Equal Protection Clause are upheld without the state being required to "resort to close distinctions" or to "maintain a precise,

⁴⁶Bull v. United States, 295 U.S. 247, 55 S.Ct. 695 (1935).

scientific uniformity". This court held that any other position would "subject the essential taxing power of the state to an intolerable supervision hostile to the basic principles of our government". This view of respect for state tax systems was maintained in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S.Ct. 1001 (1973) and has been a consistent view of this Court as early as 1870.

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public." Dows v. City of Chicago, 11 Wall. 108, 110, 20 L.Ed. 65 (1870).

Not only this Court but also Congress has recognized the importance of state income tax systems. In the State and Local Fiscal Assistance Act of 1972⁴⁷, (hereinafter the Act) Congress provided for a method of collecting state taxes along with federal tax collections. Under the Act, any state that agreed to the collection scheme replaced its judicial procedures under state law with those procedures available to a federal taxpayer under Chapter 76 of the Internal Revenue Code and Title 28 of the United States Code. Under such a scheme, judicial remedies would then be in the federal and not the state courts. Congress recognized how

⁴⁷Public Law, 92-512; 86 Stat. 919; Title II, § 202(a), October 20, 1972, 86 Stat. 936, added subchapter E of the Internal Revenue Code of 1954, as amended §§ 6361-6365.

intrusive such an invasion of the state's sovereignty would be and thereby made the collection scheme completely elective as explained in the Senate Report.

"It should be emphasized that this system is entirely voluntary for the States. The Federal Government will not collect a State's individual income taxes unless the State has chosen, in accordance with its constitutional procedures, to enact an income tax law that meets the provisions of the bill; and even then, not until after the State has notified the Secretary of the Treasury that it wishes the Federal Government to collect and administer the State's individual income taxes. In effect, then, this title of the bill merely offers a simplified and less expensive method for carrying out a policy determined by a State, e.g., a determination by the State to have an income tax and to conform the tax substantially to the Federal income tax. Nothing in the bill requires a State to have an income tax against its will; nothing in the bill requires a State to follow the Federal income tax against its

will if the State prefers a different income tax system." Senate Report No. 92-1050 as shown in 1972 U. S. Code Cong. and Adm. News, p. 3874, 3915-3916.

Congress was even further impressed with the sovereignty of the state by placing limitations on the broad invasion of state tax judicial remedies, where the State's Constitution was involved or where the United States might be a party. In those instances, Congress left the state judicial remedy open.

"Generally, the Federal Government is to deal with taxpayers and appear in court on behalf of any State whose income tax is to be collected under these provisions, and to represent the State's interests in all administrative and judicial proceedings (civil and criminal) relating to the administration and collection of the State's individual income tax, in the same manner as it represents the interests of the United States in Federal income tax matters.

However, the committee recognizes that the principles of federalism require that a State represent its own interests with respect to proceedings in a State court involving the constitution of that State and with respect to proceedings involving the relationship between the United States and the State. As a result, under the bill, the State, and not the Federal Government, will represent the interests of the State in these two matters." Ibid. at page 3917. (Emphasis added)

It is this very adherence to federalism and state sovereignty in its fundamental affairs that requires Congress to make a clear statement of its intent to alter the federal-state balance relating to state tax schemes.⁴⁸

⁴⁸It is of course recognized that § 1983 was passed as a statute pursuant to the Fourteenth Amendment intended to cause a shift in federal-state relations. Mitchum v. Foster, 407 U.S. 225 (1972). However, that fact alone does not mean that Congress intended to require states to entertain claims seeking tax refunds in the absence of a clear statement to that effect.

Since no such intent is clearly expressed by Congress § 1983 cannot be found to be mandatory upon the states in tax disputes.

2. Congress did not intend to require state courts to entertain § 1983 claims where to do so would require abrogating sovereign immunity. Such abrogation can be accomplished only by a clear statement of Congress. No such statement is found in § 1983. In actions in the federal courts against a state, the Eleventh Amendment⁴⁹ provides sovereign immunity from suit.

⁴⁹The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

However, this immunity is not a complete bar in the federal courts since a party may enjoin a state official who is carrying out an unconstitutional statute while acting in his official capacity. Ex Parte Young, 201 U.S. 123, 28 S.Ct. 441 (1907). Thus, the state acting through the official can be enjoined.

Retroactive monetary relief is not allowed in federal courts since such is an action against the state to which the state may raise its immunity. Edelman v. Jordan, supra. However, this court has found that the bar of the Eleventh Amendment sovereign immunity can be removed when Congress is acting pursuant to a statute enacted under the grant of authority in § 5 of the Fourteenth Amendment. Such was the case in Fitzpatrick v. Bitzer, supra, where the removal of the sovereign immunity

and Eleventh Amendment bar was found based on an expressed "congressional intent" in Title VII of the Civil Rights Act of 1964 to abrogate such immunity.

Not every Congressional act contains the authorization to sue the state. In Quern v. Jordan, supra, this Court found that even though § 1983 was enacted pursuant to § 5 of the Fourteenth Amendment it did not abrogate the sovereign immunity of the state. This conclusion was reached because "§ 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States, * * *." Thus, § 1983 is not available for recovering retroactive monetary awards from a state.⁵⁰

⁵⁰Quern involved an Eleventh Amendment immunity in the federal courts, but as

In the instant case, the respondents asserted in their appeal to the South Carolina Supreme Court, that this suit was barred due to sovereign immunity.⁵¹ The petitioners asserted in their Brief that state sovereign immunity was no bar to their claim since state law was not controlling.⁵² It is clear as developed below that under federal law the action in the instant matter is a suit against the state and is barred by sovereign immunity.

will be developed, the conclusion Quern reached is also applicable to the sovereign immunity retained by the states as protected under the concept of federalism when states are sued in their own courts.

⁵¹Transcript of Record before the South Carolina Supreme Court as additional sustaining ground No. 5 at page 161.

⁵²Consolidated appellants' and respondents' Brief of Respondents/Appellants at pages 19-21 as filed before South Carolina Supreme Court.

The parties sued in the instant case are identified as the South Carolina Tax Commission and three named Commissioners sued in their official capacity as Commissioners. The suit seeks a money judgment of \$580. It is clear under Ford Motor Company v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 350 (1945) and Quern v. Jordan, supra, that suits to recover money from the state entitles the state to raise sovereign immunity. It is settled that the South Carolina Tax Commission is an agency of and tantamount to the state.⁵³ Likewise, since the Commissioners are sued in their official capacity⁵⁴ and a state

⁵³Argent Lumber Co. v. Query, 178 S.C. 1, 182 S.E. 93, 95 (1935).

⁵⁴The Commissioners are only nominal defendants since just as in Governor of

income tax payment is sought, it is clear that the funds for the judgment sought will be funds of the state rather than personal funds. Therefore, if South Carolina's sovereign immunity is available on the same level as South Carolina's Eleventh Amendment immunity in federal court then Quern v. Jordan, supra, would hold that § 1983 does not have the congressional authorization to allow suits against the state. If such is true, the § 1983 action was properly dismissed by the South Carolina Supreme Court. The remainder of this argument will demonstrate that South Carolina's

Georgia v. Mandrago, 1 Pet. 110 (1828), the judgment sought is not against the person but rather against the officer or the successor to the office. Such is fortified by the List of Parties identified at Page II of petitioners' Brief showing that Robert C. Wasson is no longer a party since his office has now been relinquished by him. Rather, his successor in his official capacity is a party.

sovereign immunity in its own court is a proper reason for dismissing the § 1983 claim.⁵⁵

A state's sovereign immunity has constitutional magnitude and is a retained right of a state. Sovereign immunity was an important issue fully explored by the framers of the Constitution.⁵⁶ In explaining the reach

⁵⁵ Although Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565 (1978), indicates that the Eleventh Amendment is not available for protection in suits against the state in state courts, the concept of sovereign immunity which it embodies is an attribute of sovereignty retained by the states to be raised when the state is sued in its own courts.

⁵⁶ 1 C. Warner, The Supreme Court in United States History (1922 Ed.) at page 91 states:

"* * * the existence of any [right of the Federal Judiciary to summons a State as a defendant] had been disclaimed by many of the most eminent advocates of the new Federal Government; and it was largely owing to their

of the Federal judicial power under Article III, § 2 of the United States Constitution, James Madison agreed that the States retained their sovereign immunity since "[I]t is not in the power of individuals to call any state into court".⁵⁷ This court has recognized the constitutional magnitude of sovereign immunity in several cases. In Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 509 (1890) this court found:

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of

successful dissipation of the force of the existence of such Federal power that the Constitution was finally adopted * * *."

⁵⁷ III Elliott, Debates in the Several State Conventions on the Adoption of the Federal Constitution.

justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence."

The view of sovereign immunity was likewise earlier expressed in Cunningham v. Macon & Brunswick R R. Co., 109 U.S. 446, 3 S.Ct. 292, 293 (1883) as being accepted:

"* * * as a point of departure unquestioned, that neither a state nor the United States can be sued as defendant in any court in this country without their consent except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court of the constitution."

Sovereign immunity has not only been recognized in earlier cases⁵⁸ of

⁵⁸Smith v. Reeves, 178 U.S. 436, 20 S.Ct. 919 (1900), Duhne v. New Jersey, 251 U.S. 311, 40 S.Ct. 154 (1920); Monaco v. Mississippi, 292 U.S. 313, 54 S.Ct. 1745 (1934).

this Court but also recognized recently in Pennhurst State School & Hospital v. Holderman, 104 S.Ct. 900 (1984). There this court found that the Eleventh Amendment was an affirmation of the fundamental principle of a state's sovereign immunity. Although Pennhurst involved immunity of a state in federal court, the same principle applies in the state court since as Alexander Hamilton explained in The Federalist No. 81 at page 602:

"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. * * * Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, * * *."

Here, South Carolina did not surrender its immunity. This is particularly true in light of the fact that the interpretation of § 1983 as

mandatory will intrude into the traditional and fundamental right of "the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interest * * *."⁵⁹

In the instant case, the petitioners have attempted to sue the state since the action seeks a retroactive money judgment and names the South Carolina Tax Commission as a party and names the Commissioners as nominal defendants only in their official capacity. The state has not waived its immunity which immunity it is entitled to raise as a constitutionally retained right under the basic principle of federalism. Congress may have the authority to abrogate the state's

⁵⁹Allied Stores of Ohio, Inc., supra, at page 440.


immunity pursuant to appropriate legislation under § 5 of the Fourteenth Amendment where it does so by a clear statement. Since Quern v. Jordan, supra, holds that § 1983 "does not explicitly and by clear language" abrogate such immunity, the South Carolina Supreme Court properly refused to entertain the § 1983 claim.

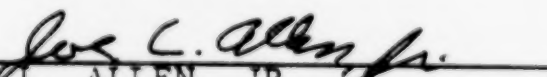
CONCLUSION

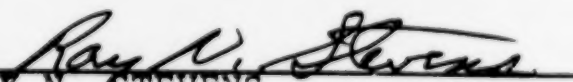
The petitioners have asked this Court to find that § 1983 is mandatory upon state courts when such remedy is used in a state income tax dispute. Such a position would have the effect of dismissing South Carolina's jurisdictional limitations, disregarding the lack of any legislative intent in § 1983 concerning state tax systems and ignoring legislative intent in subsequent acts which leave the administration of state tax systems to the states. The petitioners' position would allow taxpayers to ignore existing adequate state remedies and bring actions involving taxes without having first paid the disputed taxes and thereby deprive the states of their vital revenues during the entire period

of litigation. Section 1983 and its history simply do not yield the evidence to support congressional intent to provide a mandatory federally-imposed state tax remedy in state court.

For the reasons expressed in this Brief, the decision of the South Carolina Supreme Court to decline to entertain the remedy sought under 42 U.S.C. § 1983 by the petitioners should be upheld and this matter ended.


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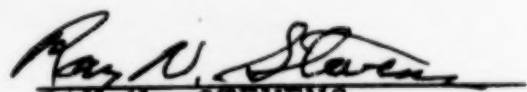

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CERTIFICATE OF SERVICE

I hereby certify that on the 21
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APPENDIX A

STATUTES INVOLVED IN ADDITION TO THOSE
SET FORTH IN APPENDIX E TO PETITION
AND IN BRIEF OF PETITIONERS.

26 U.S.C. 6361 provides in pertinent
part:

(a) Collection and administration.
In the case of any State which has
in effect an agreement with the
Secretary entered into under
section 6363, the Secretary shall
collect and administer the quali-
fied State individual income taxes
of such State. No fee or other
charge shall be imposed upon any
State for the collection or ad-
ministration of the qualified State
individual income taxes of such
State or any other State. All
provisions of this subtitle,
subtitle G, and chapter 24 re-
lating to the collection and
administration of the taxes im-
posed by chapter 1 on the incomes
of individuals (and all civil and
criminal sanctions provided by this
subtitle or by title 18 of the
United States Code with respect to
such collection and administration)
shall apply to the collection and
administration of qualified State
individual income taxes as if such
taxes were imposed by chapter 1,
except to the extent that their
application is modified by the
Secretary by regulations necessary
or appropriate to reflect the pro-
visions of this subchapter, or to
reflect differences in the taxes

or differences in the situations in which liability for such taxes arises.

(b) Civil proceedings.-Any person shall have, with respect to a qualified State individual income tax (including the current collection thereof), the same right to bring or contest a civil action and obtain review thereof, in the same court or courts and subject to the same requirements and procedures, as he would have under chapter 76, and under title 28 of the United States Code, if the tax were imposed by section 1 (or were for the current collection of the tax imposed by section 1). To the extent that the preceding sentence provides judicial procedures (including review procedures) with respect to any matter, such procedures shall replace judicial procedures under State law, except that nothing in this subchapter shall be construed in any way to affect the right or power of a State court to pass on matters involving the constitution of that State.

(c) * * * .

(d) Special rules.-

(1) United States to represent State interest.-

(A) General rule.-In all administrative proceedings, and in all judicial proceedings (whether civil or criminal), relating to the administration and collection of a State qualified individual income tax the interests of the State imposing such tax shall be represented

by the United States in the same manner in which the interests of the United States are represented in corresponding proceedings involving the taxes imposed by chapter 1.

(B) Exceptions.-Subparagraph (A) shall not apply to-

(i) proceedings in a State court involving the constitution of that State, and

(ii) proceedings involving the relationship between the United States and the State.

* * * ."

FEB 14 1985

ALEXANDER L. STEVAS
CLERK

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No. 84-249

In the Supreme Court of the United States

October Term, 1984

ROGER L. SPENCER, ET UX,
PETITIONERS,

v.

SOUTH CAROLINA TAX COMMISSION, ET AL.,
RESPONDENTS.

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INTRODUCTION

In this case, the South Carolina Supreme Court refused to consider Roger and Shirley Spencer's claim under 42 U.S.C. §§ 1983 and 1988. This refusal was wrong. Section 1983 "gave a federal cause of action to ... taxpayers." Fair Assessment In Real Estate Association v. McNary, 454 U.S. 100, 103-104 (1981). State courts have concurrent jurisdiction over these claims. Martinez v. California, 444 U.S. 277, 283 n.7 (1980); Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980). Under Testa v. Katt, 330 U.S. 386 (1947), the South Carolina courts were obligated to exercise their jurisdiction to enforce the Spencers' federal claim.

In seeking to defend the lower courts' refusal to enforce the Spencers'

federal rights, respondents make three principal arguments. They say (1) that Congress eliminated the Spencers' § 1983 claim by enacting the Tax Injunction Act, 28 U.S.C. § 1341; (2) that even if the Spencers have a § 1983 claim, Testa did not obligate the state courts in this case to enforce it because they lacked jurisdiction to do so under state law; and (3) that, in any event, the Spencers' federal claim is barred by principles of sovereign immunity.

These contentions lack merit. The plain language and legislative history of the Tax Injunction Act show that it was enacted only to restrict federal court jurisdiction and not to displace rights or remedies provided by federal law. South Carolina state law shows that the lower courts had "general

jurisdiction" to enforce the Spencers' federal claim. Moreover, Testa itself shows that the "lack of jurisdiction" exception has no application here. Finally, Hutto v. Finney, 437 U.S. 678 (1978), and other decisions of this Court show that sovereign immunity does not bar the Spencers' claim for fees under § 1988, and, in any event, the state statute permitting suits for refunds has waived sovereign immunity.

1. The Tax Injunction Act does not strip the Spencers of the protections of §§ 1983 and 1988.

Respondents¹ and amici insist

¹In this reply brief, citations to the brief for respondents will be indicated as "Resp. Br. ____," to the brief for petitioners as "Petr. Br. ____," to the amicus brief of the Council of State Governments, et al., as "Council Br.," to the amicus brief of the Attorney General of the Commonwealth of Massachusetts, et al., as "State Atty. Gen. Br. ____," to the appendix to the petition for

that the Tax Injunction Act and the policies it represents limit taxpayers to the remedies that are available under state law² and "[bar] a claim for a tax refund under § 1983."³ Respondents attempt to alarm the Court by suggesting that § 1983 suits in state court will devastate state tax systems and create "precisely the result § 1341 was meant to cure."⁴ These contentions are incorrect. There is no cause for alarm if the Spencers prevail. Rather if the Spencers do not prevail, the purpose of §§ 1983 and 1988 will be defeated.

certiorari by "App. _____ at _____," to the transcript of record filed in the South Carolina Supreme Court by "R. _____".

²Council Br. at 11.

³State Atty. Gen. Br. 17 (quoting Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370, 374 (1976)).

⁴Resp. Br. at 55.

A. The language and legislative history of the Tax Injunction Act show that Congress did not intend to prevent the assertion of §§ 1983 and 1988 claims in state courts. The arguments of respondents and amici distort the plain meaning and legislative history of the Tax Injunction Act. The plain language of this short statute makes its limited purpose clear:

[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341 (emphasis added).

Like the statute in Dickman v. Commissioner, 104 S. Ct. 1086, 1089 (1984), the language of § 1341 "is clear and admits of but one reasonable interpretation." By its express terms,

the Act does no more than deprive federal courts of jurisdiction in specified cases; it says nothing whatsoever about limiting the duties of state courts to enforce federal rights.

In referring to a "plain, speedy and efficient" remedy, Congress did not, as amicus suggests, "establish an alternative remedial structure"⁵ remotely analogous to the elaborate federal statutory schemes considered in Smith v. Robinson, 104 S. Ct. 3457 (1984), and Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981).⁶ As the Act makes clear, Congress simply required that

⁵Council Br. 11.

⁶The federal statutes that displaced § 1983 in those cases were comprehensive and detailed and granted congressionally crafted remedies as part of a broad general scheme directed at specific problems.

state procedures be adequate to enforce claims based on both federal and state law before stripping the federal courts of jurisdiction. See Rosewell v. LaSalle National Bank, 450 U.S. 503, 515 n.19 (1981). Respondents and amici ignore this plain language when they argue that the Act limits the rights and remedies of taxpayers who sue in state courts.⁷

The legislative history of the Act confirms that it was not intended to

⁷Respondents' and amicus' argument based on the State and Local Fiscal Assistance Act of 1972, 26 U.S.C. §§ 6361-6365, see Resp. Br. 64-68, and 26 U.S.C. § 7430, see Council Br. 6-7, is even more farfetched. The terms on which Congress is willing to collect income taxes for states, 26 U.S.C. §§ 6361-6365, have nothing to do with the Spencers' right to bring this §§ 1983 and 1988 action in state court. Moreover, Congress has not amended § 1988 to impose in § 1983 actions the restrictions which 26 U.S.C. § 7430 places on attorney's fees in disputes with the Internal Revenue Service. Congress's decision not to impose those limits on fee awards in §§ 1983 and 1988 actions must be respected.

limit taxpayers to remedies provided by state law. The Senate Report on § 1341 described it as simply amending the "Judicial Code with respect to the jurisdiction of the district courts ... over suits relating to the collection of State taxes." S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937). Senator Bone, who introduced the Tax Injunction Act, called it "a very short bill" designed to alter "the jurisdiction of district courts." 81 Cong. Rec. 1415 (1937). He emphasized that "the bill [did] not take away any equitable right of a taxpayer, or deprive him of a day in court." *Id.* at 1416. The Act passed with little debate. There is no evidence that Congress believed it was doing anything more than limiting the

jurisdiction of federal courts.⁸

The absence of such evidence is not surprising because to achieve its purpose Congress did not have to do anything more than remove federal jurisdiction over state tax matters. Prior to the enactment of the Tax Injunction Act, federal courts had become "free and easy with injunctions"⁹ in tax cases for two reasons. First, the Eleventh Amendment often prevented federal courts from providing a remedy at law thus justifying the issuance of federal court

⁸This Court has repeatedly observed that the purpose of the Tax Injunction Act was "'to limit drastically federal district court jurisdiction to interfere with ... the collection of taxes.'" California v. Grace Brethren Church, 457 U.S. 393, 408-409 (1982) (quoting Rosewell v. LaSalle National Bank, 450 U.S. 503, 522 (1981)).

⁹McNary, 454 U.S. at 129 (Brennan, J., concurring) (quoting England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 431 (1964) (Douglas, J., concurring)).

injunctions not available in state courts; second, the federal courts had failed to apply strictly the principle of comity that otherwise limited federal court jurisdiction.¹⁰ The problem was complicated further because foreign corporations through diversity jurisdiction were able to secure more favorable remedies in federal courts than were available to citizens of a state in that state's courts. S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). In the Tax Injunction Act, Congress responded to these concerns simply by removing the jurisdiction of federal courts. Solving these problems did not require Congress to alter state court jurisdiction over

¹⁰McNary, 454 U.S. at 129 n.15, 130 (Brennan, J. concurring) (quoting S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937) and 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone)).

federal claims, and Congress did not do so.¹¹

The decisions of this Court show the error of respondents' contrary reading of the statute. The Court specifically acknowledged the appropriateness of § 1983 tax actions in state court in

¹¹Respondents' reliance on the Tax Injunction Act is also ill-founded because the Act applies to requests to "enjoin, suspend or restrain the assessment, levy or collection of taxes" (emphasis added). As this plain language suggests, the statute does not even apply to damage claims. See Northwood Apts. v. LaValley, 649 F.2d 401, 404-05, vacated and remanded on other grounds, 454 U.S. 1118 (1981), on remand, 673 F.2d 159 (6th Cir. 1982); Fulton Mkt. Cold Storage Co. v. Cullerton, 582 F.2d 1071, 1078-1079 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979). To be sure, comity often requires federal court deference to state tax procedures when damages are sought. McNary, 454 U.S. at 113-115. Such a common-law rule, however, is a far cry from the elaborate statutory schemes held to "repeal" or "replace" § 1983 in National Sea Clammers, supra, and Smith v. Robinson, supra. See Smith, 104 S. Ct. at 3469. It is far-fetched to argue that § 1341 "repeals" § 1983's provision for damage actions when § 1341 does not apply to damage claims at all.

Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984). There the Court declared that:

[c]hallenges to the validity of state tax systems under 42 U.S.C. § 1983 ... must be brought in state court.

Id. at 920 (emphasis added). It would be logically inconsistent to require federal taxpayers to bring § 1983 tax actions in state court and then to hold that the Tax Injunction Act forecloses such actions.

In Rosewell, the Court held that under § 1341, to avoid federal court interference, a state must afford "'full protection to ... federal rights.'" 450 U.S. at 513 (quoting Hillsborough v. Cromwell, 326 U.S. 620, 625 (1946)). The state cannot reasonably argue that it is fully protecting the Spencers' federal rights in accord with § 1341 when it relies on § 1341 to deny them

their federal rights under §§ 1983 and 1988.

B. Respondents are also wrong to suggest that requiring state courts to enforce § 1983 will disrupt state tax systems. Respondents predict that, unless the Tax Injunction Act is read to foreclose enforcement of § 1983, dire consequences will ensue. They say taxpayers will be able to settle disputes "by injunction" and circumvent state administrative remedies.¹² These predictions, however, do not stand up under analysis.

Although they point to no possibility of disruption in this case, respondents fear that the availability of a § 1983 claim in other lawsuits will result in widespread injunctions against

¹² Resp. Br. 59.

collection of state taxes. These injunctions, they say, will frustrate the basic state policy of generally permitting only suits for refunds in order to protect the public fisc.

Respondents' fears have no basis. The feared injunctions will not issue. Injunctive relief is available only if there is no adequate remedy at law.¹³ This principle applies fully in § 1983 actions.¹⁴

¹³See e.g., Toomer v. Witsell, 334 U.S. 385, 392 (1948); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2942 at 368-369 (1979); and cases discussed in n.15 infra.

¹⁴Section 1983 does not require injunctive relief unless there is no adequate relief at law. See Allee v. Medrano, 416 U.S. 802, 814 (1974); Bonner v. Circuit Court, 526 F.2d 1331, 1335-1336 (8th Cir. 1975), cert. denied 424 U.S. 946 (1976). Moreover, this Court has made it clear that injunctions in § 1983 actions must be used "sparingly" and with respect for the need for governments to be able to have control over the conduct of their affairs. See Rizzo v. Goode, 423 U.S. 362, 378 (1976). If there is any doubt that this

When a state has provided for a "plain, speedy, and efficient" refund, it will be difficult, if not impossible, to obtain an injunction under § 1983. The very refund actions which respondents say are threatened by § 1983 injunctions will provide an adequate remedy and prevent injunctions. This Court and the South Carolina courts have repeatedly denied requests for injunctions on the ground that a refund is an adequate remedy at law.¹⁵ Respond-

rule applies in § 1983 tax actions in state court, this Court can remove it simply by so declaring. Such a rule would provide a far more suitable response to respondents' generalized fear of injunctions than foreclosing § 1983 claims altogether.

¹⁵See, e.g., Toomer v. Witsell, 334 U.S. at 392; Textile Hall Corp. v. Riddle, 207 S.C. 291, 300, 35 S.E.2d 701 (1945) (quoting Chesterfield County v. State Highway Dep't, 191 S.C. 19, 53, 3 S.E.2d 686 (1939)) ("[A] taxpayer may enjoin the collection of an illegal tax, provided he ... [has] no adequate legal remedy ..., but ... [state statutes] provide a full, adequate and complete legal

ents' concern about widespread injunctions under § 1983 is thus illusory.

In the rare cases where there is no adequate remedy at law for unconstitutional or illegal taxation, injunctive relief should be available in state court whether § 1983 is invoked or not. If an injunction is necessary to provide a "plain, speedy, and efficient" remedy for a violation of federal rights, federal courts must provide it if the state courts do not. The Tax Injunction Act does not prevent injunctions against state taxes when injunctions are the only possible remedy. In fact, when it enacted the Tax Injunction Act, Congress

plete legal remedy by payment under protest and a suit to recover That the legal remedies thus provided are adequate and exclusive has been so frequently decided as to render citation of authority superfluous."); Fleming v. Power, 77 S.C. 528, 530 58 S.E. 430, 431 (1907).

anticipated that state courts would grant injunctions in some tax cases.¹⁶ Respondents' argument regarding injunctions does not justify wholesale abandonment of § 1983 in virtually all tax cases.

Respondents similarly err in two respects when they suggest that § 1983 suits will allow taxpayers routinely to circumvent state administrative remedies. First, in South Carolina for example, courts do not require exhaus-

¹⁶The Senate Report regarding the Tax Injunction Act specifically noted that injunctions were available in state courts when a "tax law is invalid or the property is exempt from taxation." S. Rep. No. 1035, 75th Cong., 1st Sess. 1. In addition, "[a]s originally enacted, the statute deprived the district courts of jurisdiction wherever a 'plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.' 50 Stat. 738 (emphasis added). The phrase 'at law or in equity' was dropped as 'unnecessary' in the 1948 revision of the statute." Rosewell, 450 U.S. at 534 n.7.

tion at all in tax cases like this one, where only legal issues regarding "illegality and/or unconstitutionality" of state tax practices or statutes are involved. Andrews Bearing Corp. v. Brady, 261 S.C. 533, 536-537, 201 S.E.2d 241, 243 (1973). Therefore, in many if not most § 1983 tax cases, circumvention of administrative remedies will not be an issue.

Second, respondents' argument assumes that administrative remedies need not be exhausted in connection with a § 1983 state court tax case. That assumption, however, is not a settled proposition. Patsy v. Board of Regents, 457 U.S. 496 (1982), involved neither an action in state court nor a challenge to state taxes. Indeed, Justice Brennan's concurring opinion in McNary, 454 U.S.

at 133-138, together with the majority, concurring, and dissenting opinions in Patsy, suggest that the exhaustion of administrative remedies might be required in § 1983 tax actions.

In any event, as with respondents' contention with respect to injunctions, respondents overreach in arguing that possible interference with exhaustion requirements justifies dispensing altogether with § 1983 relief. If respondents' concerns are justified and sufficiently weighty, the proper course is to uphold state exhaustion rules in § 1983 state court tax cases, rather than to hold § 1983 unavailable altogether.

C. Respondents' argument not only distorts the Tax Injunction Act but also undermines the important national policies underlying §§ 1983 and 1988.

Respondents' misinterpretation of the Tax Injunction Act would eliminate a right conferred by § 1983. Section 1983 was designed to "[create] a new federal cause of action," Allen v. McCurry, 449 U.S. 90, 99 (1980), and to "override certain kinds of state laws," Monroe v. Pape, 365 U.S. 167, 173 (1961).¹⁷

¹⁷Relying on the section's legislative history, respondents and amici also argue that § 1983 was designed only to create federal court jurisdiction to remedy state infringements of constitutional rights. It follows, they say, that no intent to compel state courts to assume jurisdiction in § 1983 cases can be inferred. This reading of § 1983 is, however, too narrow. Given that § 1983 was also had other purposes, it is obvious that Congress intended that state courts should have to apply § 1983. As noted in Thiboutot, prior to elimination of the jurisdictional amount requirement in federal question cases, there was a broad class of § 1983 cases that could be brought only in state courts. 448 U.S. at 11 n.12. State courts remain the only forum for most § 1983 claims involving state taxation. McNary, 454 U.S. at 116. If the respondents arguments were correct, then Congress would have enacted § 1983 without making any provision for the enforcement of a

The plain language of § 1983 clearly includes among its intended beneficiaries:

taxpayers, or anyone else who was able to prove that his constitutional or federal rights had been denied by any State.

McNary, 454 U.S. at 103-104 (emphasis added).

This Court in McNary held that "taxpayers [who attack state tax statutes] must seek protection of their federal rights" in state courts and went on to note that "a § 1983 claim

substantial class of claims under that statute for almost 100 years; Congress also would have provided taxpayers a § 1983 cause of action but would have failed to enable them to assert it. There is no reason to assume that Congress left any § 1983 claims so that they could be rendered unenforceable at the whim of state courts. See Petr. Br. at 31-34, 40-42.

[could be asserted] in state court."

Id. at 116. Having recognized that § 1983 extends protection to taxpayers, this Court should not now withdraw that protection by accepting respondents' tortured reading of the Tax Injunction Act.

Nor should the Court look to the vague intimations of Congressional intent respondents seek in § 1341 in order to withdraw the right to attorney's fees created by § 1988, a specific and recent act of Congress. Congress enacted § 1988 to provide attorney's fees to people just like the Spencers who would not otherwise be able to enforce their constitutional rights.¹⁸ There is no evidence that Congress intended to exempt instances of unconstitutional

¹⁸See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) and Petr. Br. 43-50.

state taxation from the fees remedy provided by § 1988.

Unconstitutional taxation is no less serious than other deprivations of constitutional rights.¹⁹ Respond-

¹⁹In addition to their successful privileges and immunities claim, the Spencers alleged violations of the equal protection and due process clauses of the Fourteenth Amendment, R. 12-13. The state supreme court did not address these additional allegations, App. A at 9a, but its holding that there is no justification for the statute's discrimination establishes the validity of the Spencers' equal protection and due process claims. See Memorial Hospital v. Maricopa County, 415 U.S. 250, 253-262 (1974); Jones v. Helms, 452 U.S. 412, 418-419 (1981); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). The assertion of amicus, State Atty. Gen. Br. 20-26, that § 1983 may not be used to enforce the privileges and immunities clause of Article IV of the Constitution is, therefore, irrelevant. In addition that assertion is erroneous because it ignores the clear language of § 1983. As noted in Lynch v. Household Finance Corp., 405 U.S. 538, 549 and n.16 (1972), the phrase in § 1983 "rights, privileges or immunities secured by the Constitution and laws" means what it says. § 1983 embraces the Spencers rights under the privileges and immunities clause. There is no distinction "between personal liberties and property rights." Id. at 542; cf. Thiboutot, 448 U.S. at 4.

ents' arguments would allow state officials to get away with imposing small but unconstitutional taxes on blacks, aliens or other groups just because the expense of attacking those taxes is prohibitive. This is exactly what Congress intended to avoid by enacting § 1988.

In Maine v. Thiboutot, 448 U.S. at 11, the Court recognized that Congress intended for § 1988 to provide for fees in state courts. In addition, the Court emphasized the special need for fees in state court cases like this one where access to federal courts is restricted. See also McNary, 454 U.S. at 117. It said:

[i]f fees were not available in state courts, federalism concerns would be raised.... [G]iven that there [are] cases stating causes of action under § 1983 but not cognizable in federal court ... some plaintiffs would be forced to go to state courts, but con-

trary to congressional intent, would still face financial disincentives to asserting their claimed deprivations of federal rights.

Thiboutot, 448 U.S. at 11 n.12 (emphasis added). Congress intended for § 1988 to eliminate financial disincentives in cases like this one.²⁰

It is especially ironic that respondents seek to frustrate the policies of § 1988 in this case. Respond-

²⁰Section 1988 was intended to make it clear that the "American Rule" regarding attorney's fees does not apply when the violation of constitutional rights is involved. Hensley v. Eckerhart, 461 U.S. at 429. "The discretion of the ... court in deciding whether to award attorney's fees to a prevailing party is narrowly limited." Bonnes v. Long, 599 F.2d 1316, 1318 (4th Cir. 1979) cert. denied, 455 U.S. 961 (1982). To discourage frivolous suits, § 1988 itself authorizes fee recoveries against plaintiffs who institute baseless actions. See Hensley v. Eckerhart, 461 U.S. at 429 n.2; Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). There is no special reason not to apply section 1988 in tax cases.

ents' argument for curtailing the availability of § 1988 fees in this case rests on vaguely perceived threats to state injunction and exhaustion rules. The Spencers, however, exhausted administrative remedies, and they neither sought nor received injunctive relief.

2. The state trial court had adequate jurisdiction to consider the Spencers' federal claim.

Respondents contend²¹ that the trial court was not obligated under Testa to entertain the Spencers' § 1983 claim because its jurisdiction was not "adequate and appropriate" under state law. See Testa, 330 U.S. at 394. Respondents, however, have misinterpreted state law. The South Carolina Constitution and the decisions of the

²¹ See Resp. Br. 13-45.

South Carolina Supreme Court establish that the trial court's jurisdiction is sufficient to obligate it to entertain the Spencers' federal claim.

The trial court in this case is a court of general jurisdiction. It has the power under the South Carolina Constitution to entertain any civil action. Article V, § 7, of the Constitution of South Carolina declares that the trial court in this case is

a general trial court with original jurisdiction in civil and criminal cases.

The South Carolina Supreme Court has held repeatedly that "the [l]egislature cannot take away" this "constitutionally granted [judicial] power." State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982); Strickland v. Seaboard Air Line Ry Co., 112 S.C. 67, 69, 98 S.E. 853 (1919).

Trial courts in South Carolina clearly have the jurisdictional power to grant monetary awards, declaratory relief, and attorney's fees.²² They routinely grant these types of relief to those entitled to receive them. In this case, both the trial court and the state supreme court exercised their jurisdiction to declare the tax statute void and grant the refund as requested under § 1983.²³

²² See Petr. Br. 58 n.23

²³ Although respondents insist that the trial court lacked the jurisdiction to declare the state tax statute at issue unconstitutional, the trial court's order states that the statute "is hereby declared unconstitutional and as a result of this order is null, void and of no effect." App. B. at 19(a). The South Carolina Supreme Court affirmed. App. A. at 9(a), 11(a). Fleming v. Power, 77 S.C. 528, 531, 58 S.E. 430, 431 (1907), acknowledges that in South Carolina a taxpayer who seeks to recover taxes paid as a result of an unconstitutional statute may also obtain a declaration that the statute is unconstitutional.

The general jurisdiction of the trial court in this case is exactly the kind of jurisdiction that this Court found sufficient in Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1, 57 (1912). Reasoning that the Connecticut courts in that case were "courts of general jurisdiction," Mondou held that the state courts were obligated to entertain and enforce claims under the Federal Employers Liability Act ("FELA") even though the FELA provided a remedy in some circumstances where state law did not. See 223 U.S. at 49-50, 56, 57-58.

Despite the clear general jurisdiction of the trial court under state law, respondents contend that two state statutes deprive the trial court of jurisdiction over the Spencers' § 1983 claim.

Those statutes are S.C. Code Ann.

§ 12-47-10²⁴ and S.C. Code Ann.,

§ 12-47-50.²⁵ Respondents' reliance

24§ 12-47-10 provides:

The collection of ... taxes ...shall not be stayed or prevented by any injunction, writ or order issued by any court or judge. And no writ, order or process of any kind whatsoever staying or preventing the Tax Commission or any officer of the State charged with a duty in the collection of taxes from taking any steps or proceeding in the collection of any tax, whether such tax is legally due or not, shall in any case be granted by any court or the judge of any court.

25§ 12-47-50 provides:

There shall be no other remedy than those provided in this chapter in any case of the illegal or wrongful (a) collection of taxes, (b) attempt to collect taxes or (c) attempt to collect taxes in funds or moneys which the county treasurer shall be authorized to receive under the law other than such as the person charged with such taxes may tender or claim the right to pay.

(emphasis added)

on these statutes to establish the "lack of jurisdiction" exception to Testa fails as a matter of state and federal law.

As a matter of state law, those statutes do not limit the jurisdiction of the trial court. They simply specify and limit the remedies that are available in those courts under state law.

Indeed, the South Carolina Supreme Court upheld the constitutionality of the predecessor of § 12-47-10 in State v.

County Treasurer, 4 S.C. 520, 530-32

(1873), because the statute d'd not limit jurisdiction but only took away "an existing remedy." 4 S.C. at 530. The court recognized that the legislature could "establish, change or abolish any remedy" under state law without infringing on "the possession of full jurisdic-

tion by a Court." Id. at 531. If §§ 12-47-10 and 12-47-50 were, as respondents contend, limits on the jurisdiction of the trial court, those statutes would violate the state constitution.²⁶

²⁶ Respondents' argument that §§ 12-47-10 and 12-47-50 impose jurisdictional limits is based on a misinterpretation of numerous opinions of the South Carolina Supreme Court. The decisions cited by respondents which actually refused relief did so because the plaintiff was not entitled to it rather than due to a lack of jurisdiction. See, e.g., cases cited in footnote 15 and Santee River Cypress Co. v. Query, 168 S.C. 112, 114, 119, 167 S.E. 22 (1932) (the members of tax commission were "enjoined from the collection of ... tax until the merits have been determined." The court declared that courts have "the duty ... to enjoin the collection of an illegal tax in those cases where no adequate legal remedy is provided for the aggrieved taxpayer."); Sutton v. Fort Mill, 171 S.C. 291, 295, 172 S.E. 119 (1933); Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 215, 58 S.E. 811, 812 (1907); Aetna Fire Ins. Co. v. Jones, 78 S.C. 445, 447, 456, 59 S.E. 148, 152 (1907). The statement that the court in Elmwood Cemetery Ass'n v. South Carolina Tax Comm'n, 255 S.C. 457, 462, 179 S.E.2d 609, 611 (1971), was "without jurisdiction to determine the liability of" the taxpayer for future years did not mean that the

As a matter of federal law, no matter what label is placed on these statutes, they do not establish the "lack of jurisdiction" exception to Testa. These statutes represent state remedial policy. They are no different from the policy against enforcing penal statutes of other governments involved in Testa. Respondents' argument that the trial court in this case lacked jurisdiction is only another version of the policy argument rejected in Testa.

When stripped of its jurisdictional camouflage, respondents' position is

trial court lacked judicial power to do so. Perpetual Bldg. & Loan Ass'n v. South Carolina Tax Comm'n, 255 S.C. 523, 526-527, 180 S.E.2d 195, 197 (1971), and Elmwood Cemetery Ass'n v. Wasson, 253 S.C. 76, 78, 169 S.E.2d 148 (1969), make it clear that declaratory relief was denied the plaintiff in the Elmwood Cemetery case because the plaintiff was "not entitled to any relief by way of declaratory judgment" under state law. 255 S.C. at 527, 180 S.E.2d at 197.

that in tax cases the South Carolina courts do not have to grant any relief other than that authorized by the state legislature. This position directly discriminates against federal remedies. Testa squarely rejected this type of argument.²⁷

There is no doubt that the state courts in this case would have jurisdiction to enforce statutes like §§ 1983 and 1988 if the state legislature were to enact them. Those courts, therefore, must enforce §§ 1983 and 1988 in this case.

²⁷This Court rejected a similar attempt by a state court to escape its constitutional obligation to enforce claims within its jurisdiction in Broderick v. Rosner, 294 U.S. 629, 643 (1935).

3. Sovereign immunity does not permit the state courts to reject the Spencers' §§ 1983 and 1988 claims.

There is no significant issue regarding sovereign immunity in this case. The Spencers have obtained all the relief they sought except for attorney's fees.

In Hutto v. Finney, 437 U.S. at 693-694, the Court held that Congress intended § 1988 to permit fee recoveries from state treasuries, even in federal court cases where the Eleventh Amendment applies. Thus, Hutto makes it clear that sovereign immunity is no defense to the Spencers' claim for attorney's fees under § 1988. Respondents seek to circumvent Hutto by arguing that sovereign immunity bars any underlying § 1983 relief, so that § 1988 cannot apply.

This argument fails for two reasons.

First, there is no sovereign immunity to the Spencers' successful claim for declaratory relief against the individual defendants sued in their official capacity. This Court's decisions in Pennhurst, Quern, Edelman, and Ex parte Young all make it clear that sovereign immunity did not prevent the Spencers from having the state statute declared unconstitutional.²⁸

²⁸Ex parte Young, 209 U.S. 123, 159-160 (1908), established that when a state official acts under the authority of a state law which is alleged to be unconstitutional, the "state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." The federal court in Young was entitled to decide "the question of unconstitutionality" under the Federal Constitution without regard to any sovereign immunity asserted by the state. Edelman v. Jordan, 415 U.S. 651, 666-668, 677 (1974), and Quern v. Jordan, 440 U.S. 332, 337, 345 (1979), both reaffirmed the vitality of the principle of Ex parte Young. More recently in Pennhurst, 104 S. Ct. at 909, this Court noted that under the

Declaratory relief was available under § 1983, and the Spencers obtained the declaration of unconstitutionality that they sought. Under Hutto and Maher v. Gagne, 448 U.S. 122, 132 n.15 (1980), therefore, the Spencers are entitled to attorney's fees under § 1988 regardless of whether sovereign immunity bars their refund claim. As the Court declared in Pulliam v. Allen, 104 S. Ct. 1970, 1982 (1984) (quoting H. R. Rep. No. 94-1558, p. 9 (1976)), the "legislative history of [§ 1983] confirms Congress' intent that an attorney's fee award be available even when damages would be barred or limited by 'immunity doctrines and special defenses.'"

"holding in Ex parte Young," "a suit challenging the constitutionality of a state official's action is not one against the State."

Second, in any event, the state has statutorily waived its sovereign immunity with respect to the Spencers' claim for a refund. The Spencers brought their § 1983 suit in accord with the procedures of S.C. Code Ann.

§ 12-47-220. That statute plainly states that:

Any person paying any taxes under protest may ... after making such payment, ... bring an action against ... the Commission ... for the recovery thereof.

The South Carolina Supreme Court has declared that this statute is a waiver of sovereign immunity permitting an action, in accord with the requirements of the statute, against the state "to recover taxes unjustly or illegally taken." Bomar v. City of Spartanburg, 181 S.C. 453, 463, 187 S.E. 921 (1936).

The opinion of the state supreme court below confirms that there is no genuine sovereign immunity issue in this case. That court did not even suggest that the Spencers' § 1983 claim was barred by sovereign immunity. Indeed, the court granted the Spencers the refund and declaratory relief they had sought under § 1983. Respondents did not attempt to bring the issue of sovereign immunity to the court's attention. Their brief to the state supreme court had abandoned the issue.²⁹

²⁹Although respondents listed sovereign immunity as an additional sustaining ground for the trial court's opinion, R. 161, the respondents abandoned that ground, by failing to argue it in their brief. See Rule 1 §§ 3(A) and (C) and Rule 4 §§ 6 and 8 of the Rules of the Supreme Court of South Carolina, 22 S.C. Code Ann. (1977 and Supp. 1983); cf. State v. Givens, 267 S.C. 47, 52 S.E.2d 867 (1976).

CONCLUSION

Despite the arguments of respondents, it is clear that Congress intended for people like the Spencers to have the benefit of fees under § 1988 in a case like this. For the reasons expressed in their initial brief and this reply brief, the Spencers respectfully request that the portion of the judgment of the South Carolina Supreme Court rejecting their claim of attorney's fees under §§ 1983 and 1988 be reversed.

February 13, 1985

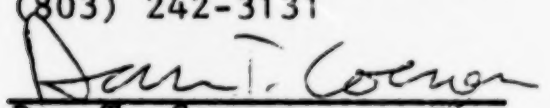
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ALEXANDER L. STEVAG,
CLERK

No. 84-249

In the Supreme Court of the United States

October Term, 1984

ROGER L. SPENCER, ET UX,
PETITIONERS,

v.

SOUTH CAROLINA TAX COMMISSION, ET AL.,
RESPONDENTS.

BRIEF FOR THE PETITIONERS

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93 PP

QUESTIONS PRESENTED

1. May a state court of general jurisdiction refuse to entertain a plaintiff's 42 U.S.C. § 1983 claim and thereby avoid awarding attorney's fees under 42 U.S.C. § 1988 even though the plaintiff successfully challenges in that court a state statute's validity under the United States Constitution?

2. May a state court deny attorney's fees under 42 U.S.C. §§ 1983 and 1988 on the ground that Congress did not intend §§ 1983 and 1988 to require an award of attorney's fees where state law provides a state remedy without providing an award of attorney's fees?

LIST OF PARTIES

Petitioners, plaintiffs-appellants below, are ROGER L. SPENCER and SHIRLEY L. SPENCER.

Respondents, defendants-appellants below, are the SOUTH CAROLINA TAX COMMISSION, JOHN T. WEEKS, as chairman of the South Carolina Tax Commission, S. HUNTER HOWARD, JR., CHARLES N. PLOWDEN and JOHN M. RUCKER in their capacity as commissioners of the South Carolina Tax Commission. Previously, ROBERT C. WASSON, in his prior capacity as a commissioner of the South Carolina Tax Commission, was a defendant.

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OPINIONS BELOW

The opinion of the Supreme Court of South Carolina has not yet been reported in the official reports but is reported at 316 S.E.2d 386. A copy of that opinion is attached as Appendix A to the petition for certiorari. The opinion of the trial court is not reported. A copy is attached to the petition for certiorari as Appendix B.

JURISDICTION

The opinion of the Supreme Court of South Carolina was filed on May 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The petition for certiorari was filed on August 13, 1984 within 90 days of the date of the decision below as required by 28 U.S.C. § 2101(c). This Court granted certiorari on October 9, 1984.

(1)

**CONSTITUTIONAL PROVISION AND
STATUTES INVOLVED**

United States Constitution,
Article VI, clause 2, (App.
E at 25a.)*

28 U.S.C. § 1331 (Br. App.
A at 1a.)

Tax Injunction Act of 1937:
28 U.S.C. § 1341 (App. E
at 25a.)

28 U.S.C. § 1343(3) (Br. App.
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Civil Rights Attorney's Fees
Awards Act of 1976: 42 U.S.C.
§ 1988 (App. E at 26a.)

S.C. Code Ann. § 16-5-60 (Br.
App. A at 2a.)

* In this brief, citations to the appendix to the petition for certiorari are indicated by "App. ____ at ____." Citations to the appendix to this brief are indicated by "Br. App. ____ at ____." Citations to the joint appendix are indicated by "J.A. ____." Citations to the transcript of record filed in the South Carolina Supreme Court are indicated by "R. ____." Citations to respondents' brief in opposition to petition for writ of certiorari are indicated by "Resp. Br. In Opp. ____."

S.C. Code Ann. § 12-47-220
(App. E at 26a.)

S.C. Code Ann. § 12-47-270
(App. E at 27a.)

STATEMENT

The South Carolina Supreme Court has refused to enforce the petitioners' rights under 42 U.S.C. §§ 1983 and 1988. Although the petitioners successfully challenged the constitutionality of a state tax law, the court refused to consider their request for an award of fees pursuant to §§ 1983 and 1988. (App. A at 9a-11a.)

The petitioners, the Spencers, have resided in North Carolina since 1977 (R. 20.) but, in 1980, derived all their income from Mr. Spencer's job in South Carolina. (R. 21, 91.) When the Spencers filed for a refund of approximately \$500 of South Carolina

income taxes withheld for 1980 (R. 21, 94.), the South Carolina State Tax Commission denied their request and claimed about \$100 more in taxes. (R. 23, 94.) The Commission's action was based on a recently enacted South Carolina statute which denied the Spencers the right to deduct any non-business expenses against their South Carolina income because North Carolina did not permit non-residents to take similar non-business deductions against income earned in North Carolina. (App. B at 14a, R. 94.)

The Spencers then followed the procedure, specified by South Carolina law, of paying under protest and initiating a suit for refund in state court under S.C. Code Ann. § 12-47-220. (App. B. at 15a.) The State Tax Commission rejected the Spencers' protest. (R. 94a.) The

Spencers' refund lawsuit challenged the constitutionality of the new tax statute on which the Commission had relied. The Spencers sought the money they had been forced to pay under that statute as well as their attorney's fees. (R. 14.) They alleged, among other things, that the new tax statute violated the privileges and immunities clause, Article IV, § 2, clause 1, as well as other parts of the United States Constitution. (R. 11-13.)

The Spencers brought their lawsuit pursuant to 42 U.S.C. § 1983 and prayed for their attorney's fees under 42 U.S.C. § 1988, in addition to relying on the refund procedure of state law. (App. B at 18a.) The Spencers took advantage of the availability of attorney's fees under § 1988 in order to undertake litigation with a potential recovery of less than

\$600. (App. B at 19a.) State court was the only forum reasonably available because the chances of successfully bringing the action in federal court were slim due to the Tax Injunction Act, 28 U.S.C. § 1341, and the principle of comity. See Fair Assessment In Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).

The Spencers prevailed in their attack on the new tax statute. The trial court ruled that it had jurisdiction over the lawsuit under South Carolina law and that the Spencers had complied with all the preconditions for bringing the action under state law. (App. B at 15a.) The state trial court also declared that the tax statute violated the United States Constitution and ordered the Commission, pursuant to S.C. Code Ann. § 12-47-220,

to pay the Spencers approximately \$600. (App. B at 17a-18a.) The court, however, refused to entertain the Spencers' § 1983 claim and refused to award attorney's fees under § 1988. (App. B at 10a, 18a-99a.) It recognized

that the Plaintiffs [had] ... incurred attorney's fees and other expenses which probably [made] the refund ... a "tasteless" victory.

(App. B at 18a.) But it insisted, in spite of §§ 1983 and 1988, that S.C. Code Ann. § 12-47-270 prevented the award of attorney's fees because S.C. Code Ann. § 12-47-220 provided the Spencers a remedy and S.C. Code Ann. § 12-47-270 did not allow costs to be taxed to either party in an action under § 12-47-220. (App. B at 18a-19a.)

The Commission appealed the portion of the order striking down the new tax

statute. (R. 159.) The Spencers appealed the trial court's refusal to entertain the § 1983 claim and denial of attorney's fees. (App. D at 23a-24a.) On appeal, the Commission argued that the denial of attorney's fees should be affirmed for several reasons. One reason was that the trial court had no obligation to consider the § 1983 claim because there was an adequate remedy at state law under § 12-47-220. (App. C at 22a.) In response, the Spencers contended that the federal Constitution required the trial court to consider their § 1983 claim and award them attorney's fees. (App. D at 24a.) They contended further that any state statute that purported to deny them the attorney's fees guaranteed by §§ 1983 and 1988 was invalid because that statute had to yield to §§ 1983 and 1988 under the

supremacy clause of the United States Constitution. (App. D at 23a.)

The South Carolina Supreme Court affirmed the trial court in all respects. (App. A at 11a.) It held that the new statute was unconstitutional under the privileges and immunities clause of the United States Constitution and, therefore, did not address the Spencers' additional constitutional attacks on the statute. (App. A at 9a.) But it left the Spencers with a "tasteless victory" because it affirmed the trial court's decision not to address the § 1983 claim and award attorney's fees under § 1988. (App. A at 10a-11a.)

In support of its decision to reject the Spencers' §§ 1983 and 1988 claim, the state supreme court noted that this Court has not ruled that state courts must

entertain § 1983 actions. (App. A at 10a.) In spite of the Spencers' contention that they had obtained only a "hollow victory," the South Carolina court concluded that §§ 1983 and 1988 may not be invoked to supplement available state remedies by providing attorney's fees. (App. A at 10a.) The court noted that S.C. Code Ann. § 12-47-270 prohibited the taxation of most costs in actions pursuant to § 12-47-220. (App. A at 9a.) The court declared that "state remedies for asserting rights may not be circumvented by invoking § 1983" (App. A at 10a.), and that Congress had not intended that §§ 1983 and 1988 be used solely "to justify the allowance of counsel fees." (App. A at 10a.)

After bearing the expense of successfully challenging the constitutional-

ity of the statute under which they and many others had been taxed, the Spencers were left with a recovery of only \$585. (App. B at 20a.)

SUMMARY OF ARGUMENT

The South Carolina Supreme Court's refusal to consider the Spencers' claim for attorney's fees under 42 U.S.C. §§ 1983 and 1988 violates the Constitution. The refusal violates the Constitution because both the supremacy clause and the federal structure created by the Constitution obligate state courts to enforce §§ 1983 and 1988.

1.

The obligation arises because, under Martinez v. State of California, 444 U.S. 277 (1980), and Maine v. Thiboutot, 448 U.S. 1 (1980), it is clear that state courts have jurisdiction over claims

under §§ 1983 and 1988 and, under Testa v. Katt, 330 U.S. 386 (1947), state courts must exercise their jurisdiction to enforce federal claims. Testa v. Katt held that state courts must enforce a federal claim which they would enforce if the claim had arisen under state law. The obligation declared in Testa is a basic constitutional tenet. It was recognized by the framers of the Constitution and has been invoked, affirmed, and enforced repeatedly by this Court in numerous decisions. In addition to establishing the obligation to enforce federal claims, the Court's decisions also show that this obligation exists whenever a state court has jurisdiction over a federal claim.

Therefore, state courts are obligated to enforce §§ 1983 and 1988. The Consti-

tution makes §§ 1983 and 1988 the supreme law of the land in South Carolina and requires state courts to enforce that law.

The obligation of state courts to enforce §§ 1983 and 1988 was implicitly acknowledged by this Court in Martinez. The requirement has been recognized by state courts as well. The great majority of state courts willingly enforce §§ 1983 and 1988. Moreover, the legislative histories of §§ 1983 and 1988 show that Congress contemplated state enforcement when it enacted those statutes. In fact, when § 1988 was amended to provide for attorney's fees, state courts were the only forum available for a substantial class of § 1983 claims.

State court enforcement is not only constitutionally required but also particularly necessary to achieve the goals of §§ 1983 and 1988. Those statutes were enacted to enable victims of violations of federal laws to vindicate their rights even though they have little or no money. Section 1983 supplements state remedies and § 1988 grants fees to ensure that § 1983 can be enforced by the average citizen.

The state courts' rejection of the Spencers' claims undercuts the goals of §§ 1983 and 1988 in cases like this one, as well as many other types of cases. As made clear in Fair Assessment In Real Estate Ass'n v. McNary, 454 U.S. 100 (1981), state courts are the only reasonably available forum for § 1983

claims, like this one, which attack the constitutionality of state tax statutes. If attorney's fees under § 1988 are not available in those situations, many taxpayers will be forced to bear the burden of unconstitutional taxation. Moreover, the unavailability of fees under § 1988 in state court will also prevent or discourage many § 1983 claimants from enforcing their federal rights in other contexts. If state courts may refuse to enforce §§ 1983 and 1988, a situation like that which led to the enactment of § 1983 originally will persist.

There is no justification for the state court's refusal to enforce the Spencers' §§ 1983 and 1988 claim for fees. The sole exception to the rule of Testa does not apply in this case because

it is clear that the state court's jurisdiction is adequate and appropriate under both federal and state law. Nor do the reasons offered by the state supreme court justify its holding. The state court did not even attempt to rely on the exemption to the principle of Testa or apply Testa. Instead, the court suggested that § 1983 may not be used to "circumvent" or "supplement" state remedies.

The suggestion that § 1983 may not be used to circumvent state remedies does not apply to this case. The Spencers have complied with state procedures and have exhausted available state administrative remedies. Moreover, Patsy v. Board of Regents, 457 U.S. 496 (1982), holds that exhaustion is not required in § 1983 actions.

The suggestion that §§ 1983 and 1988 may not be used to supplement state remedies directly contradicts the opinions of this Court construing those statutes. This Court has repeatedly noted that § 1983 was designed to supplement state remedies. Moreover, Maher v. Gagne, 448 U.S. 422 (1980), as well as the legislative history of the fees portion of § 1988, leaves no doubt that fees are available under § 1988 even though relief is granted under an alternate theory without reaching a plaintiff's § 1983 claim. The state court was not free to refuse to enforce §§ 1983 and 1988 simply because the refund which the Spencers sought was available under state law.

Nor was the state court entitled to refuse the Spencers' claims by virtue of the principle of comity or the Tax

Injunction Act, 28 U.S.C § 1341. This Court's opinions show that comity and the Act limit only the power of federal courts and do not exempt either state courts or state tax laws from federal causes of action.

The portion of the judgment of the South Carolina Supreme Court rejecting the Spencers' claim for attorney's fees under §§ 1983 and 1988 should therefore be reversed.

ARGUMENT

The South Carolina Supreme Court's refusal to enforce the Spencers' §§ 1983 and 1988 claim violates the United States Constitution. The court's action violates the Constitution because (1) the Constitution obligates state courts to exercise their jurisdiction to enforce §§ 1983 and 1988; (2) state court

enforcement of §§ 1983 and 1988 is particularly necessary to implement the congressional policy embodied in those statutes; and (3) there is no justification for the South Carolina courts' refusal to enforce the Spencers' claim under §§ 1983 and 1988.

1. The Constitution obligates state courts to exercise their jurisdiction to enforce §§ 1983 and 1988.

A. Martinez v. State of California, 444 U.S. 277 (1980), and Maine v. Thiboutot, 448 U.S. 1 (1980), make it clear that state courts have concurrent jurisdiction with federal courts over claims under §§ 1983 and 1988. In Martinez, this Court approved the California courts' acceptance of jurisdiction over § 1983 claims. 444 U.S. at 283 n.7. Later that same term,

in Thiboutot, the Court explicitly rejected the contention that federal courts have exclusive jurisdiction over § 1983 actions. The Court said:

[a]ny doubt that state courts may also entertain such actions was dispelled by Martinez.

448 U.S. at 3 n.1. Accord Fair Assessment In Real Estate Ass'n v. McNary, 454 U.S. 100, 116 (1981).¹

B. The constitution requires state courts to enforce federal claims. In Testa v. Katt, 330 U.S. 386, 394 (1947), this Court made it clear that "[s]tate courts are not free to refuse enforcement of" a federal claim which "would be

¹No one has questioned in this case the state courts' jurisdiction over the Spencers' federal cause of action. The South Carolina Supreme Court recognized that it had jurisdiction when it cited Martinez and Thiboutot. (App. A at 10a.) The Respondents concede that the state courts have jurisdiction under federal law. (Resp. Br. in Opp. at 3-4.)

enforced by that [s]tate's courts" if the claim had arisen under the laws of that state. Testa involved a refusal by the Supreme Court of Rhode Island to enforce a claim under the Emergency Price Control Act on the ground that it was a "penal statute" of a foreign government. This Court declared that the refusal flew "in the face of the fact that States of the Union constitute a nation" and disregarded the "purpose and effect of" the supremacy clause of the Constitution. 330 U.S. at 389. This Court also made it clear that "the obligation of states to enforce ... federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide." Id. at 391.

Testa did not announce a new principle. It reaffirmed and succinctly

stated a basic tenet of the supremacy clause² of the Constitution as well as the fourteenth amendment and the federal structure created by the Constitution. The Court in Testa based its holding directly on Claflin v. Houseman, 93 U.S. 130 (1876), which had relied upon both the intent of the framers of the constitution and the supremacy clause. Testa, 330 U.S. at 390-92; Claflin, 93 U.S. at 136-138. Claflin established that state courts must recognize federal laws "as

²The supremacy clause, Article VI, § 2, states

This Constitution, and Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (emphasis added).

operative within the State" and constituting "the law of the land for the State." Id. at 137. Claflin also declared that, under the Constitution, "there is no reason why the State court should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied" by Congress or the Constitution. Id.

The rule of Testa v. Katt has been basic to this country's system of federalism from the beginning. The framers of the Constitution, in part at the request of Mr. Rutledge from South Carolina, elected "to make use of the state tribunals" whenever possible rather than to require Congress to establish inferior federal courts. P. Bator, P. Mishkin, D. Shapiro and H.

Wechsler, Hart and Wechsler's The Federal Courts and The Federal System 11-12 (2nd ed. 1973) (referred to in this brief as "Hart and Wechsler"). Alexander Hamilton explained the key role of the state courts in The Federalist No. 82, 421 (Everyman's ed. 1971). He said:

State courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal; and I am even of the opinion that in every case in which they were not expressly excluded by the future acts of the national legislature they will of course take cognisance of the causes to which those acts may give birth. This I infer from the nature of judiciary power and from the general genius of the system. ... [T]he national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union.

In accord with Hamilton's remarks, the first Judiciary Act in 1789 required

"that private litigants ... look to the state tribunal in the first instance for vindication of federal claims." Hart and Wechsler at 844. Until 1875 state courts were the "only forum for vindicating many important federal claims." Palmore v. United States, 411 U.S. 389, 401 (1973). Even after Congress granted federal courts limited general federal question jurisdiction in 1875, "state courts remained the sole forum for [most] federal cases" below the jurisdictional amount. Id. For example, as noted by Thiboutot, prior to the elimination of the amount requirement for federal question jurisdiction in 1980, there was a class of § 1983 claims that could be brought only in state court. Thiboutot, 448 U.S. at 11 n.12.

Robb v. Connolly, 111 U.S. 624, 637 (1884), and other cases before Testa repeatedly asserted the duty of state courts to vindicate federal claims. In Robb, the Court noted that

the judges of the State courts are required to take an oath to support that Constitution and they are bound by it and the laws of the United States made in pursuance thereof,... as the supreme law of the land, "anything in the ... laws of any State to the contrary notwithstanding."

Id. at 637. Robb declared that state courts have the obligation to "enforce" every right secured by the federal Constitution and laws and that if the state courts should fail in that regard, the "party aggrieved" could bring the case to "this court for final and conclusive determination." Id.

In other cases prior to Testa, this Court repeatedly required the state

courts to fulfill their obligation to vindicate federal claims. In Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1 (1912), the Supreme Court of Errors of Connecticut refused to entertain an action under the Federal Employers Liability Act ("FELA"). This Court found the state court's assertion that the FELA conflicted with the policies of the state "quite inadmissible". Id. at 57. The Court declared that the policy of the federal act was "as much the policy of Connecticut as if the act had emanated from its own legislature," id., and held that the FELA could "be enforced as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion." Id. at 59 (emphasis supplied). Likewise, in McKnett v. St.

Louis and San Francisco Ry. Co., 292

U.S. 230 (1934), the Court prevented the Alabama courts from refusing jurisdiction over an FELA claim. The Court declared that "a state may not discriminate against rights arising under federal laws." Id. at 234.³

³To the extent that Ward v. Board of County Comm'rs, 253 U.S. 17 (1920), involved an attempt to assert a federal cause of action in state court, Ward is another example of the Court's insistence, prior to Testa, that state courts enforce federal claims. In Ward, members of an Indian tribe attempted to recover funds allegedly collected coercively by the county in spite of the plaintiffs' federal statutory exemption from state taxation. The Oklahoma Supreme Court rejected the claim for a refund on the ground that the taxes had been paid voluntarily and, in any event, there was no state statute permitting recovery of funds from the county. This Court reversed, holding that the taxes had been paid coercively and that the 14th Amendment required that the members of the tribe be given a refund in state court, even though there was no state statutory cause of action permitting it. Because the Court's opinion in Ward states that the "right to the exemption was a federal right," id. at 22, it appears that the reversal of the state supreme court in Ward, in effect, forced the state courts to entertain a federal cause of action.

Since Testa, this Court has again and again underscored the importance of the obligation of state courts to enforce federal laws. In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238 (1969), the Court noted that state courts are required to enforce 42 U.S.C. § 1982, a statute closely related to § 1983. The Court asserted that the remedy available in federal courts to enforce § 1982 "is available in the state courts." Id. Stone v. Powell, 428 U.S. 465, 493 n.35 (1976), declared again that state courts have "a constitutional obligation to ... uphold federal law". Hathorn v. Lovorn, 457 U.S. 255, 269 (1982) (emphasis added), reiterated that a state court presented with a federal claim has the "duty" to decide it, if the state court has the

"power" to do so. In Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 and n.4 (1981), this Court noted that state court enforcement of federal claims is part of "the relation between the States and the National Government within our federal system." The Court recognized further that state court jurisdiction "facilitates the enforcement of federal rights" and that "[s]tate courts stand ready to vindicate the federal right[s]." Id.

Recently the Court's opinion and Justice O'Connor's concurring and dissenting opinion in Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982), both specifically reaffirmed the rule of Testa. The Court's opinion reasserted the "obligation of states" to enforce

federal laws. 456 U.S. at 769; see also id. at 760. Justice O'Connor's opinion agreed that state courts must "evenhandedly adjudicate state and federal claims falling within their jurisdiction." Id. at 785.⁴

C. The obligation to enforce federal claims arises by implication whenever state courts have jurisdiction. Congress need not specifically command state courts to enforce federal laws. Mondou, McKnett, Testa, and Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377 (1920), establish that the existence of state court jurisdiction under federal

⁴In Jackson v. Lyker Bros. Steamship Co., 387 U.S. 731, 735-36 (1967), the Court also invoked Testa to require Louisiana courts to adjudicate admiralty cases within their jurisdiction, and Justice Marshall's concurring opinion in Employees of Dept. of Public Health & Welfare v. Missouri, 411 U.S. 279, 298 (1973), noted that under Testa state courts must enforce federal law because it is "the supreme law of the land."

law is sufficient to create an obligation to exercise that jurisdiction.

Mondou, Douglas, and McKnett involved claims under the FELA. In those cases, this Court made it clear that the duty of state courts to enforce the Act arose simply as a result of the existence of their concurrent jurisdiction.⁵ The Court declared that

[t]he existence of jurisdiction creates an implication of duty to exercise it and that its exercise may be onerous does not militate against that implication.

Mondou, 223 U.S. at 58. The state

⁵Although an amendment to the FELA in 1910 had stated that the jurisdiction of the federal courts was "concurrent with" that of state courts, this Court interpreted the amendment as merely acknowledging, "instead of granting," state jurisdiction which had already existed and had been acknowledged previously in the general federal question statute enacted in 1875. Mondou, 223 U.S. at 56. The statutory acknowledgement of concurrent state jurisdiction served only to eliminate any con-

courts were required to enforce the FELA because they had jurisdiction to do so, not because of any explicit congressional command to enforce the Act.

Testa v. Katt also shows that a state court with power to entertain federal claims has the duty to exercise that power.⁶ Testa involved a claim under the Emergency Price Control Act which, like the FELA, simply acknowledged the existence of concurrent state court jurisdiction and did not attempt

tention that federal courts had exclusive jurisdiction. This Court noted specifically that "Congress [had] not attempted to compel states to provide courts" to enforce the FELA, McKnett, 292 U.S. at 233, or "to require State Courts to entertain suits arising under it," Douglas, 279 U.S. at 387.

⁶In the same way, it appears that this Court, in Ward v. Board of County Comm'rs, 253 U.S. 17 (1920), required the state courts to enforce a federal right to a tax refund without any reference to a statutory requirement that they do so. See note 3 at 28, supra.

to command state courts to enforce its provisions. Importantly, the Court's holding was not derived from statutory language. The Court concluded that the explication in Claflin v. Houseman, 93 U.S. 130 (1876), of the supremacy clause and the general structure of the federal government "answered most of the arguments...advanced against the power and duty of state courts" to enforce federal claims. Testa, 330 U.S. at 391 (emphasis added). Testa, therefore, established that, by virtue of the constitutional structure of the government and the supremacy clause, state courts are obligated to exercise their concurrent jurisdiction over federal claims.

D. The obligation to enforce federal claims applies to the Spencers' §§ 1983 and 1988 claims. Martinez shows

that the principle of Testa applies to this case.⁷ This Court in Martinez was not required to consider whether a state court must enforce §§ 1983 and 1988. Nevertheless, the Court implicitly recognized the obligation of state courts under Testa to enforce § 1983 as well as § 1988 when it said:

We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim. Testa v. Katt, 330 U.S., at 394. But see Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969).⁸

⁷See 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure Jurisdiction 2d § 3573, at 197 (1984).

⁸In Chamberlain v. Brown, the Tennessee court departed from the rule of Testa and held that state courts in Tennessee are not required to entertain § 1983 actions. The court in Chamberlain, however, did not have the benefit of this Court's holdings in Martinez and Thiboutot.

Martinez, 444 U.S. at 283 n.7. The obligation of state courts to enforce §§ 1983 and 1988 is also implicit in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238 (1969), where the Court ruled that the remedies for 42 U.S.C. § 1982, a closely related statute, are "available in state courts."

Testa made it clear that, under the Constitution, §§ 1983 and 1988 are the law of the land in South Carolina and that the courts of South Carolina must enforce them. South Carolina courts may not, therefore, refuse to consider the Spencers' §§ 1983 and 1988 claim for attorney's fees.

In accord with the Constitution, Testa, and the implications of Martinez and Sullivan, numerous state courts have

recognized that they must enforce § 1983.⁹ Of those courts, the Supreme Court of Wisconsin in Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977), has provided the most thorough analysis of the issue. After considering the supremacy clause, the legislative

⁹See, e.g. Terrell v. City of Bessemer, 406 So. 2d 337, 340 (Ala. 1981) ("courts of this state must accept jurisdiction over claims brought under 42 U.S.C. § 1983 if a § 1983 plaintiff selects a state court as his forum"); Felder v. Foster, 107 Misc. 2d 782, 436 N.Y.S.2d 675, 677 (N.Y. Sup. Ct. 1981) ("[t]his court has jurisdiction to entertain all proceedings brought under sections 1983 and 1988... and must exercise that jurisdiction when such a proceeding is properly before it (Testa v. Katt....)"); Colvin v. Bowen, 399 N.E.2d 835, 837 (Ind. Ct. App. 1980) ("[S]tate courts of general jurisdiction are not free to deny enforcement of claims growing out of a valid federal statute such as § 1983."); Brown v. Pitchess, 119 Cal. Rptr. 204, 531 P.2d 772, 775 (Cal. 1975) (en banc) ("the existence of [concurrent] jurisdiction creates the duty to exercise it," and it "is unlikely that this decision will precipitate" a flood of cases in California courts.)

history of § 1983, and numerous opinions of this Court, including Testa v. Katt, the court concluded that Wisconsin state courts

have jurisdiction to hear and decide Sec. 1983 cases. In addition, they have an affirmative obligation under the Constitution of the United States to take jurisdiction whether or not the federal right asserted is pendent to a state claim.

Terry v. Kolski, 254 N.W.2d at 712.

Courts in thirty-one states and the

District of Columbia have also exercised their jurisdiction to enforce

§ 1983.¹⁰ The state courts which enforce § 1983 also enforce § 1988.¹¹

¹⁰These decisions are collected in Appendix B to this brief.

¹¹See, e.g. Stratos v. Department of Public Welfare, 387 Mass. 312, 439 N.E.2d 778, 783-85 (1982); Johnson v. Blum, 58 N.Y.2d 454, 448 N.E.2d 449, 450-451 (1983) (fee must be awarded absent "special circumstances"); Thompson v. Village of Hales Corners, 115 Wis.

The Tennessee decision¹² noted in Martinez and the South Carolina court's

2d 289, 340 N.W.2d 704, 711, 714 (1983) (award of damages and attorney's fees affirmed even though it exceeded state law limitation on municipal liability); Ward Lumber Co. v. Brooks, 50 N.C. App. 294, 273 S.E.2d 331, 333 (1981) ("it is not necessary that the court base its decision on § 1983 in order for the prevailing party to be entitled to attorney's fees under ... § 1988"); Davis v. Everett, 443 So. 2d 1232, 1235 (Ala. 1983); Caputo v. City of Chicago, 113 Ill. App. 3d 45, 446 N.E.2d 1240, 1242 (1983) (denied fees but recognized that proper § 1983 claims may be brought in state court and "fees authorized under 42 U.S.C. § 1988 are an appropriate part of the remedy in such cases").

¹²In addition to the Tennessee court's decision in Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248, 252 (1969), a Florida court in City of North Miami v. Schy, 408 So. 2d 670 (Fla. Dist. Ct. App. 1981), refused with little explanation to entertain a § 1983 claim. Courts in Georgia and Mississippi, in certain narrow contexts only, have also refused § 1983 claims. See Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370, 374 (1976) (§ 1983 rejected if administrative remedies not exhausted and cause of action is "founded only on the claim that [tax] assessments are unequal"); State Tax Commission v. Fondren, 387 So. 2d 712, 723 (Miss. 1980), cert. denied, 450 U.S. 1040 (1981) (state courts have jurisdiction over § 1983 claims but state remedies must be exhausted before challenging equality of tax assessments under § 1983 in state court).

decision in this case are contrary to those of most other state courts, as well as Testa, its precursors and progeny.

State court enforcement of §§ 1983 and 1988 is consistent with congressional intent. The legislative histories of §§ 1983 and 1988 show that members of the Congresses that enacted those statutes contemplated enforcement in state courts. As this Court noted in Allen v. McCurry, 449 U.S. 90, 99-100 (1980), by enacting § 1983, "Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts.... The debates contain several references to the concurrent jurisdiction of the state courts over federal questions." Many of those who enacted § 1983 understood the

act "to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to chose a forum in which to seek relief." Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 506 (1982).¹³

Likewise, when Congress amended § 1988 to provide attorney's fees in § 1983 actions, Representative Drinan repeatedly described the act as "author-iz[ing] the award of a reasonable attorney's fee in actions brought in

¹³Had Congress intended to exclude state courts when it originally enacted § 1983 as part of the Civil Rights Act of 1871, Congress would have specifically stated that the federal courts had jurisdiction "exclusively of the courts of several States" as it did in those exact words in other related legislation, i.e. Civil Rights Acts of 1866, 1870, and 1875. See Civil Rights Act of 1875, ch. 114, § 3, 18 stat. 335 (1875); Civil Rights Act of 1870, ch. 114, § 8, 16 stat. 141, 142 (1870); Civil Rights Act of 1866, ch. 31, § 3, 14 stat. 27 (1866).

State or Federal courts." Thiboutot, 448 U.S. at 11. As noted in Thiboutot, "the fee provision [of § 1988] is part of the § 1983 remedy whether the action is brought in federal or state court." Id. Moreover, state court enforcement was essential when Congress provided fees under § 1988 because, at that time, a large class of § 1983 claims could be brought only in state court. Id. at 11 n.12.

2. State court enforcement is particularly necessary to implement the congressional policy embodied in §§ 1983 and 1988.

A. Congress enacted §§ 1983 and 1988 to enable the victims of violations of the nation's laws to vindicate their rights even if they have "little or no money."¹⁴ Section 1983 was intended to supplement state remedies by providing a cause of action to those whose federal rights have been denied by persons acting under state authority. See, e.g., Monroe v. Pape, 365 U.S. 167, 173

¹⁴S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910. (referred to in this brief as "Senate Report on Fees Act")

(1961);¹⁵ Maine v. Thiboutot, 448 U.S. at 5-8. Awards of attorney's fees under § 1988 in state and federal courts are "'an integral part of the remedies necessary to obtain' compliance with § 1983." Id. at 11, quoting Senate Report on Fees Act at 5. Congress provided the right to attorney's fees under § 1988 in state and federal courts because it was concerned that the prospect of an empty victory would prevent the enforcement of § 1983. The Senate Report on the attorney's fees portion of § 1988 noted that

[if] our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Senate Report on Fees Act at 6.

¹⁵Monroe was overruled on other grounds in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).

The right to obtain fees in § 1983 actions in state court was crucial in 1976 when Congress amended § 1988 to provide for fees. Then, and until 1980, there was "a class of cases stating causes of action under § 1983 but not cognizable in federal court absent the \$10,000 jurisdiction amount of [28 U.S.C.] § 1331(a)." Thiboutot, 448 U.S. at 11 n.12. It would be "contrary to congressional intent" for the lack of fees to be a financial barrier in the § 1983 cases that are confined to state court. Id. The decision below conflicts with congressional intent because it establishes just such a financial barrier. The South Carolina Supreme Court itself acknowledged that the Spencers may have obtained only a "hollow victory". (App. A at 9a.)

B. The state court's rejection of the Spencers' §§ 1983 and 1988 claim deprives many victims of unconstitutional state taxation of their only practical remedy. State courts were the only forum reasonably available for the Spencers' lawsuit. The Tax Injunction Act,¹⁶ 28 U.S.C. § 1341, and the principle of comity¹⁷ effectively

¹⁶The Tax Injunction Act prohibits district courts from enjoining the collection of any state tax where a "plain, speedy, and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

¹⁷The Court in McNary, 454 U.S. at 116, held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal court." McNary did not actually decide whether a § 1983 action attacking a state tax law but not requiring scrutiny of tax assessment practices may be brought in federal court. Id. at 107 n.4. Nevertheless, the risk of being unable to bring such an action

prevented them from proceeding in federal court. As this Court noted in Fair Assessment In Real Estate Ass'n v. McNary, 454 U.S. 100 (1981), "taxpayers [who attack state tax statutes] must seek protection of their federal rights by state remedies," which in McNary included "a § 1983 claim in state court." Id. at 116.

Once the Spencers were forced to proceed in state court, the right to invoke §§ 1983 and 1988 became more important. South Carolina law does not provide attorney's fees or the costs of most items to those who successfully

in federal court after McNary is great enough to discourage plaintiffs with small claims from incurring the cost of attempting to proceed in federal court.

challenge state tax statutes.¹⁸ Taxpayer class actions are generally not permitted in South Carolina state courts.¹⁹ It would have been financially impractical for the Spencers to bring their constitutional claim for a \$585 tax refund in state court without the availability of attorney's fees under §§ 1983 and 1988.

The rejection of the Spencers' §§ 1983 and 1988 claim undercut the policies of those statutes by turning a constitutional victory into a financial

¹⁸See S.C. Code Ann. § 12-47-270 and *Hegler v. Gulf Insurance Co.*, 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978) ("as a general rule, attorney's fees are not recoverable [in South Carolina] unless authorized by contract or statute").

¹⁹See *Long v. Seabrook*, 260 S.C. 562, 567-68, 197 S.E.2d 659, 661-62 (1973).

hardship. After incurring the substantial expense necessary to establish the unconstitutionality of the statute under which they and others were taxed, the Spencers recovered only \$585. Their victory became, in the words of the trial judge, "tasteless" and a discouraging example for other taxpayers. (App. B at 18a.)

Unless they can obtain attorney's fees under §§ 1983 and 1988 in state court, taxpayers often have no choice but to bear the burden of unconstitutional state taxation. In those circumstances, the state is free unconstitutionally to extract small amounts from many people who lack the means to protect themselves. This is exactly the type of injustice that §§ 1983 and 1988 were enacted to prevent.

The burden of unconstitutional taxes is especially unjust to people like the Spencers, who must pay taxes in South Carolina although they reside and vote in another state. If left undisturbed, the decision below will certainly prevent or discourage other taxpayers from attempting to oppose unconstitutional state taxes. Contrary to congressional intent, § 1983 and the Constitution will be no more than "hollow pronouncements" for the Spencers and others with similar claims.

C. The rejection of the Spencers' claim will also prevent or discourage the enforcement of federal rights in other areas. The South Carolina court's decision is not limited to matters involving state taxation. Under the rationale of the decision below, South

Carolina state courts may not enforce §§ 1983 and 1988 in any situation where they provide remedies in addition to those available under state law. This decision thereby excludes virtually all § 1983 actions from state courts in South Carolina, because attorney's fees are available in any § 1983 action, Maine v. Thiboutot, 448 U.S. at 9, whereas attorney's fees are not normally available under state law in South Carolina.²⁰ In most cases where the § 1983 remedy remains available under the South Carolina Supreme Court's decision, that remedy is meaningless because state law already provides for attorney's fees. Therefore, in South Carolina courts, in most situations

²⁰See note 18 at 48, supra.

§§ 1983 and 1988 will be forbidden because they supplement state remedies by providing for attorney's fees; and in most of the cases where §§ 1983 and 1988 will be available, they will be redundant.

Further, if this Court permits state courts to shirk their obligation to enforce §§ 1983 and 1988, those who act under the color of state law will have less cause for concern if they deny federal rights. Many of their victims will be prevented or discouraged from availing themselves of the protections Congress has provided in §§ 1983 and 1988, for a state court is often the only practical forum for many §§ 1983 and 1988 claims.

Individual financial or logistical problems prevent many litigants from bringing their claims in federal court.

For example, due to the limited jurisdiction of federal courts, state courts may be the only place efficiently to resolve an entire matter including § 1983 claims and other claims cognizable only in state courts or claims involving additional parties, some of whom cannot be sued in federal court. See Aldinger v. Howard, 427 U.S. 1, 14-15 (1976); Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 372 n.12, 377 (1978); Pennhurst State School and Hospital v. Halderman, 104 S. Ct. 900, 919-920 (1984).²¹ State courts may also be the only useful forum when a

²¹See Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv. L. Rev. 61, 81 (1984). The author asserts that "after Pennhurst, the litigant who does not want to forgo certain state law claims must take them to state court in the first instance."

retroactive award of damages from state funds is essential and the state has waived sovereign immunity only in its own courts. See Quern v. Jordan, 440 U.S. 332, 339-40 (1979); Pennhurst, 104 S. Ct. at 907 n.9.

Moreover, as pointed out by New Times, Inc. v. Arizona Board of Regents, 20 Ariz. App. 422, 513 P.2d 960, 965 (1973), aff'd, 110 Ariz. 367, 519 P.2d 169 (1974), many citizens of that state, "because of their geographical residence, would be inconvenienced if they were forced to litigate in a federal, rather than a state, court." Closing state courts may also deprive litigants of the most accurate and efficient method of resolving questions of state law. Section 1983 actions often depend heavily, as did

this one, upon the proper construction and interpretation of state law. Those actions "are more properly heard in the state courts". McNary, 454 U.S. at 108 n.6., quoting Perez v. Ledesma, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part); see also Pennhurst, 104 S. Ct. at 920 n.32.

There can be no doubt that the goals of §§ 1983 and 1988 will be significantly impaired if this Court permits state courts to discriminate against these federal claims. The duty of state court to enforce such important national policies is an obligation imposed by the supremacy clause and the fourteenth amendment and also implicit in the federal constitutional framework. As pointed out by the Supreme Court of

Wisconsin in Terry v. Kolski, 78 Wisc. 2d 475, 254 N.W.2d 704, 710 (1977), state courts which refuse to enforce § 1983 place themselves "in the same position" as the states during the Reconstruction Era which "refused to recognize federal civil rights in state courts."

3. There is no justification for the state courts' refusal to consider the Spencers' claim for fees under §§ 1983 and 1988.

A. This case does not fall within the exception to the general rule of Testa v. Katt. Testa does not require a state court to enforce a federal claim unless its jurisdiction "under established local law" is "adequate and appropriate." 330 U.S. at 394.²²

²²Under this exception, a state court with no jurisdiction over claims arising in the locality where a federal claim has arisen need not entertain the federal claim. Herb v. Pitcairn, 324 U.S. 117, 120-121 (1945). A state court may also refuse to entertain a federal claim as the result of a nondiscriminatory application of the policy of forum non conveniens. Missouri Ex. Rel. Southern Railway v. Mayfield, 340 U.S. 1 (1950). But, as made clear in McKnett, a court may not decline jurisdiction of a federal claim based on any principle which, in effect, discriminates against a claim because it is brought under federal law. 292 U.S. at 233.

The exception recognized in Testa does not apply to the Spencers' claim for attorney's fees in this case. There is no dispute that the jurisdiction of the South Carolina trial court is both "adequate and appropriate" under established local law.²³

²³Article V, Section 7, of the South Carolina Constitution provides that "[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases...." The §§ 1983 and 1988 claims made and remedies sought in the Spencers' lawsuit are the sort of claims and remedies with which the South Carolina trial courts are familiar. South Carolina trial courts routinely grant monetary judgments. Indeed, the trial court specifically held that it had jurisdiction to grant the refund which was sought through § 1983 as well as through state law. S.C. Code Ann. § 15-53-20 expressly authorizes the state trial courts to grant declaratory relief in appropriate cases. In some contexts, state statutes also permit trial courts to award reasonable attorney's fees. See, e.g., the South Carolina Uniform Securities Act, S.C. Code Ann. § 35-1-1490, and the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140. In fact, S.C. Code Ann. § 16-5-60 grants a cause of action using language similar to that of § 1983. Section 16-5-60 is set forth at Br. App. A.

B. None of the reasons offered by the South Carolina Supreme Court justifies its refusal to consider the Spencers' claims. The South Carolina court did not rely upon the sole exception, recognized in Testa, to the obligation to adjudicate federal claims. Indeed, it did not attempt at all to apply the principles of Testa, Mondou, and McKnett. Instead, the South Carolina court merely noted that this Court had not yet decided whether state courts must "open their doors to § 1983 actions." (App. A at 10a.) Although the South Carolina court's opinion does not precisely set forth the grounds for its holding, the opinion appears to suggest two arguments for refusing to consider the Spencers' §§ 1983 and 1988 claim: (1) § 1983 may not be used to

"circumvent" state remedies and (2) § 1983 may not be invoked "solely" to supplement state remedies with attorney's fees. Both arguments rest on a misinterpretation of §§ 1983 and 1988.

If the state court has attempted to impose an exhaustion requirement by asserting that § 1983 may not be used to circumvent state remedies, the decision conflicts with Patsy v. Board of Regents, 457 U.S. 496 (1982). Patsy held that exhaustion of state remedies is not required in § 1983 actions. Moreover, the assertion is irrelevant in this case. There has been no effort by the Spencers to circumvent state remedies. The Spencers paid the disputed taxes, exhausted all available administrative remedies, and, in accord with

state procedures, filed suit for a refund in state court along with their § 1983 claim. The state supreme court's opinion acknowledges that the Spencers complied with state procedures. It grants them the refund requested and does not disturb the lower court's finding of proper jurisdiction under state law.

To the extent that the state court's opinion suggests that the court was not required to reach the Spencers' § 1983 claim after granting relief under state statutes, it conflicts with § 1988.²⁴ Maher v. Gagne, 448 U.S. 122 (1980), makes the conflict plain.

²⁴The court's second reason for denying the Spencer's claim also rests on a misconception of Brown v. Hornbeck, 54 Md. App. 404, 458 A.2d 900 (1983), as well as the purposes of §§ 1983 and 1988. The South Carolina court repeated a statement from Brown that Congress

Maher declared that under ~~§~~ 1988, a plaintiff who joins a claim that does not allow fees with a § 1983 claim and prevails on the non-fee claim "is entitled to a determination on the other claim for the purpose of awarding counsel fees." Id. at 132 n.15, quoting H.R. Rep. No. 1558, 94th Cong. 2d Sess 4 n.7 (1976)

did not intend to permit the allegation of a claim under §§ 1983 and 1988 solely "to justify the allowance of counsel fees." (App. A at 10a.), Brown, 458 A.2d at 904-905. The statement from Brown is totally inapplicable to the Spencers case because in Brown the plaintiffs attempted to invoke § 1983 for the purpose of obtaining attorney's fees even though they had no substantial federal claim. The Maryland court's rejection of that attempt does not indicate hostility to substantial §§ 1983 and 1988 claims. Indeed, Maryland state courts are open to the enforcement of substantial federal claims under § 1983, De Bleecker v. Montgomery County, 48 Md. App. 455, 427 A.2d 1075 (1981), rev'd on other grounds, 292 Md. 498, 438 A.2d 1348 (1982), and Maryland courts also award fees under § 1988 even when a plaintiff in a § 1983 suit obtains relief through state law. Attorney Grievance Comm. v. Newman, 479 A.2d 352, 358 (Md. App. 1984).

Stratos v. Department of Public Welfare, 387 Mass. 312, 439 N.E.2d 778 (1982), also shows the error of the South Carolina court's position. In Stratos, the defendant contended that the § 1983 claim should be disregarded as "superfluous" because the remedy sought was available under state law. 439 N.E. 2d at 783. The defendant contended further that the § 1983 claim was "an unnecessary afterthought, appended to the case as a 'hook' on which to hang an award of attorney's fees." Id. Relying primarily on Maher v. Gagne, the court recognized the fallacy of the defendant's argument and dismissed it saying:

Section 1983 provides an independent remedy for violation of rights protected by Federal law. If such a right is at issue, the § 1983

remedy is available, even if the State has also provided a means of obtaining relief. ... Section 1988 creates an incentive to vindicate federally protected rights. ... The fee incentive is equally useful and necessary whether the right in question is secured by Federal law alone or by State law as well. Therefore, the fact that a plaintiff claiming relief under § 1983 could have obtained relief solely by means of a state remedy - even a "routine" one - does not foreclose a fee award.

Id.

The Spencers properly relied on §§ 1983 and 1988 to supplement the state remedies, as Congress intended. As this Court noted last term in Smith v. Robinson, 104 S. Ct. 3457, 3468 n.12 (1984), "[t]here is, of course, nothing wrong with seeking relief on the basis of certain statutes because those statutes provide for attorney's fees, or with amending a complaint to include claims that provide for attorney's

fees," as long as the fee producing claim is "reasonably related to the plaintiff's ultimate success." Id. at 3467. The state court's award of attorney's fees affirmed in Maine v. Thiboutot was obtained as a result of an amendment to the complaint adding §§ 1983 and 1988 as an additional basis for relief. 448 U.S. at 3, 11. The legislative history of the fees portion of § 1988 "makes clear" that a plaintiff does not lose the right to fees merely because he prevails "on one of two or more alternative bases for relief." Smith v. Robinson, 104 S. Ct. at 3467 n.10.

Therefore, under § 1988 the state court could not avoid the Spencers' claim for fees by purporting to grant the relief requested solely under state

law. The Spencers prevailed in their constitutional attack on the statute. That attack was the heart of their § 1983 claim. They were entitled to a fee award under § 1988. Denying the Spencers' fees thwarts the federal policy embodied in § 1988 in favor of a contrary state policy. It also violates both the holding of Testa and Mondou as well as the supremacy clause.

C. Neither the Tax Injunction Act nor comity authorize the South Carolina courts' refusal to consider the Spencers' federal claim. In opposition to the petition for certiorari, Respondents contended that the Tax Injunction Act, 28 U.S.C. § 1341, and the principle of comity generally permit "a state to handle its own fiscal affairs unimpeded by federal causes of action." Brief in

opposition to certiorari at 5-6. This contention is wrong. Section 1341 and comity do not provide state courts an exemption from federal causes of action. They limit only the power of federal courts.²⁵

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981), shows that § 1341 does not exempt state courts from having to entertain federal claims against state tax laws. In Rosewell, this Court stated that the Tax Injunction Act simply "transfers" a class of federal claims to state courts as long as state procedures are adequate. Id. at 515 n.19. There is no hint in that case that Congress exempted state courts from

²⁵See California v. Grace Brethren Church, 457 U.S. 353, 409 n.22 (1982). In that case the Court stated that the purpose of § 1341 was to limit "federal court interference with...state taxes (emphasis added)." Id. at 411.

their duty to enforce federal claims. In fact, the Court made it clear that under § 1341, to avoid federal court interference, a state must afford "'full protection to ... federal rights.'" Id. at 512-513, quoting Hillsborough v. Cromwell, 326 U.S. 620, 625 (1946). In Rosewell, this Court found that the Illinois state court procedures under consideration were adequate because there was "no question" that the state courts would "hear and decide any federal claim" including any claim of a "federal right" to receive interest on taxes withheld. Id. at 515, 517.²⁶ The Tax Injunction Act does not suggest that state procedures which deny a federal right to

²⁶It was clear in Rosewell that the taxpayers could have brought a § 1983 action in state court. 450 U.S. at 511 n.14.

attorney's fees are adequate to vindicate federal rights.

Similarly, Fair Assessment In Real Estate Ass'n v. McNary, 454 U.S. 100 (1981), shows that respondents also misconstrue the principle of comity. Respondents contend that it would directly contradict McNary "to have a federal cause of action forced upon the state judicial system." Respondents' brief in opposition to certiorari at 6. To the contrary, McNary acknowledges that states are exempt by virtue of comity from federal court interference in matters of taxation only "'where the federal rights of the persons [involved can] ... otherwise be preserved unimpaired.'" 454 U.S. at 109, quoting Boise Artesian Water Co. v. Boise City,

213 U.S. 276, 282 (1909).²⁷ McNary, like Rosewell, acknowledges that state courts are expected to enforce federal rights even when state taxation is involved.

McNary did not exempt state courts from § 1983 actions. In fact, it discussed the adequacy of the available state remedies and expressly noted that the plaintiff in that case could assert a § 1983 action in state court. 454 U.S. at 116-117. McNary also acknowledged implicitly that § 1983 provides a federal right to certain remedies. The Court said

²⁷ In that respect, McNary is consistent with Ward v. Board of Comm'rs, 253 U.S. 17 (1980). In Ward, as discussed in note 3 at 28, supra, comity did not prevent this Court from ordering state courts to refund taxes taken in violation of a federal law even though state procedures did not permit the refund.

that "by its terms [§ 1983] gave a federal cause of action to prisoners, taxpayers, or anyone else who was able to prove that his constitutional or federal rights had been denied by any State." 454 U.S. at 103-104 (emphasis added). Section 1983, in conjunction with § 1988, also provides a federal right to attorney's fees in state courts. Thiboutot, 448 U.S. at 11 and n.12. The state courts of South Carolina have wrongly denied the Spencers that right.²⁸

In arguing that state courts may ignore federal causes of action in tax

²⁸ In contrast to the action of the court in this case, the Illinois court in Beverly Bank v. Board of Review, 117 Ill. App. 3d 656, 453 N.E.2d 926, 99, 102 (1983), exercised jurisdiction over a § 1983 suit attacking state taxation that was moved from federal court to state court after McNary.

cases, Respondents overlook that, under the supremacy clause, federal laws are part of the law that state courts enforce. State tax laws, like other state laws, are subject to attack when they conflict with federal law. Although federal courts may be closed to the Spencers' claims under § 1341 and comity, the state courts have an obligation to enforce those claims and grant the Spencers the relief federal law provides.

In addition, Respondents have contended that the lower courts' refusal to entertain the Spencers' § 1983 claim is justified by the exhaustion principle derived from § 1341 in Justice Brennan's concurring opinion in McNary, 454 U.S. at 133-137. Respondents' brief in opposition to certiorari at 6-7. Respondents,

however, misconstrue Justice Brennan's opinion. That opinion concluded only that § 1341 implicitly requires exhaustion of state administrative remedies, not state judicial remedies. 454 U.S. at 134 n.22. The Spencers exhausted any available administrative remedies. The concurring opinion in McNary does not permit the refusal of the Spencers' federal claim by state courts.

Nothing explicit or implicit in § 1341 or the principle of comity authorizes state courts to refuse to enforce federal claims based on § 1983 or § 1988.

CONCLUSION

For the reasons expressed above, that portion of the judgment of the South Carolina Supreme Court rejecting the Petitioners' claim for attorney's fees

under §§ 1983 and 1988 should be reversed.

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APPENDIX A

STATUTES INVOLVED IN ADDITION TO THOSE SET FORTH IN APPENDIX E TO PETITION

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343 provides in pertinent part:

- (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

S.C. Code Ann. § 16-5-60 provides:

Suits against county for damages to person or property resulting from violation of person's civil rights.

Any citizen who shall be hindered, prevented or obstructed in the exercise of the rights and privileges secured to him by the Constitution and laws of the United States or by the Constitution and laws of this State or shall be injured in his person or property because of his exercise of the same may claim and prosecute the county in which the offense shall be committed for any damages he shall sustain thereby, and the county shall be responsible for the payment of such damages as the court may award, which shall be paid by the county treasurer of such county on a warrant drawn by the governing body thereof. Such warrant shall be drawn by the governing body as soon as a certified copy of the judgment roll is delivered to them for file in their office.

APPENDIX B

STATE COURTS WHICH HAVE EXERCISED THEIR JURISDICTION TO ENFORCE § 1983 CLAIMS

Alabama - Terrell v. City of Bessemer,

406 So. 2d 337, 340 (Ala. 1981);

Alaska - Fairbanks Correctional Center

v. Williamson, 600 P.2d 743, 747

(Alas. 1979);

Arizona - New Times, Inc. v. Arizona

Board of Regents, 110 Ariz. 357, 519

P.2d 169, 176 (1974) (en banc);

California - Brown v. Pitchess, 119 Cal.

Rptr. 204, 531 P.2d 772, 775 (Cal.

1975) (en banc);

Colorado - Espinoza v. O'Dell, 633 P.2d

455, 460 n.2 (Colo. 1981);

Connecticut - Vason v. Carrano, 31

Conn. Sup. 338, 330 A.2d 98 (1974);

4a

District of Columbia - Long v. District of Columbia, 469 F.2d 927, 937 (D.C. Cir. 1972) (per Wilkey, J.);

Illinois - Albert v. Daniel, 25 Ill. App. 3d 291, 323 N.E.2d 110, 114 (1974);

Indiana - Colvin v. Bowen, 399 N.E.2d 835, 837 (Ind. Ct. App. 1980);

Kansas - Cooper v. Hutchinson Police Department, 6 Kan. App. 2d 806, 636 P.2d 184, 186 (1981);

Kentucky - Scott v. Campbell County Board of Education, 618 S.W.2d 589, 590 (Ky. 1981);

Louisiana - Ricard v. State, 390 So. 2d 882, 883-84 (La. 1980);

Maine - Thiboutot v. State, 405 A.2d 230, 235 (Me. 1979), aff'd, 448 U.S. 1 (1980);

5a

Maryland - De Bleecker v. Montgomery County, 48 Md. App. 455, 427 A.2d 1075, 1077 (1981), rev'd on other grounds, 292 Md. 498, 438 A.2d 1348 (1982);

Massachusetts - Santana v. Registrars of Voters of Worcester, 425 N.E.2d 745, 749 (Mass. 1981);

Michigan - Dickerson v. Warden, Marquette Prison, 99 Mich. App. 630, 298 N.W.2d 841, 843 (1980);

Missouri - Shapiro v. Columbia Union National Bank and Trust Co., 576 S.W.2d 310, 316 (Mo. 1978), cert. denied, 444 U.S. 831 (1979);

New Hampshire - MBC, Inc. v. Engel, 119 N.H. 8, 397 A.2d 636, 637 (1979);

New Jersey - Endress v. Brookdale Community College, 144 N.J. Super. 109, 364 A.2d 1080, 1092 (1976);

New Mexico - Gomez v. Board of Education,

85 N.M. 708, 516 P.2d 679, 681-687

(1973);

New York - Johnson v. Blum, 58 N.Y.2d

454, 448 N.E.2d 449, 450-51 (1983);

Felder v. Foster, 107 Misc. 2d 782,

436 N.Y.S.2d 675, 677 (Sup. Ct.

1981);

North Carolina - Snuggs v. Stanly

County Department of Public Health,

63 N.C. App. 86, 303 S.E.2d 646, 647

(1983);

North Dakota - Kristensen v. Strinden,

343 N.W.2d 67, 71 (N.D. 1983);

Ohio - Jackson v. Kurtz, 65 Ohio App. 2d

152, 416 N.E.2d 1064, 1067 (1979);

See Kilburn v. Guard, 5 Ohio St. 3d

21, 448 N.E.2d 1153 (1983);

Oklahoma - Powell v. Seay, 553 P.2d 161,

164 (Okla. 1976);

Oregon - Rosacker v. Multnomah County, 43

Or. App. 583, 603 P.2d 1216, 1218

(1979);

Pennsylvania - Commonwealth ex rel.

Saunders v. Creamer, 464 Pa. 2, 345

A.2d 702, 703 n.3 (1975);

Rhode Island - Carvalho v. Coletta, 457

A.2d 614, 617 (R.I. 1983);

Utah - Kish v. Wright, 562 P.2d 625,

627 (Utah 1977);

Washington - State v. Tidwell, 32 Wash.

App. 971, 651 P.2d 228, 230 n.2

(1982);

West Virginia - Harrah v. Leverette, 271

S.E.2d 322, 332 (W.Va. 1980); and

Wyoming - Board of Trustees v. Holso, 584

P.2d 1009, 1017 (Wyo. 1978).